United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18025

901

RICHARD E. LEIGH,

APPELLANT

v.

UNITED STATES

APPEAL FROM JUDGMENT OF CONVICTION
OF FORGERY AND UTTERING IN VIOLATION
OF SECTION 22-1401, D. C. CODE

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court below erred in refusing to suppress certain so-called handwriting sample cards obtained from Appellant by District of Columbia Police Officers by coercive methods and threats during a period of many hours after his arrest before he was advised of his right to counsel, of his privilege against self-incrimination, and during an unreasonable period of police detention contrary to the provisions of Rule 5(b), Federal Rules of Criminal Procedure.

2. Whether the use of the handwriting sample card on the trial constituted reversible error.

3. Whether the Court below erred in denying Appellant's post trial motion to dismiss Counts 1, 3 and 5 of the indictment for failure of the Government to prove that the three charges of forgery were committed within the District of Columbia, and whether the Court should have dismissed Counts 2, 4, and 6 charging the "uttering" of the same checks which depended for their proof on the proof of forgery as alleged in Counts 1, 3, and 5.

4. Whether Appellant was deprived of his constitutional immunity against being twice placed in jeopardy on a third trial resulting in his conviction following a second trial on February 7-8, 1963, which resulted in a mistrial, a result which was precipitated by the prosecutor who, after the jury had been sworn in the second trial and had been advised of the Government's evidence under all eight counts, moved to dismiss two counts, thus placing Appellant in the position of facing a trial violative of of his rights to due process of law, or moving for a mistrial which he did.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction on three counts of forgery and three counts of uttering in violation of Section 1401, Title 22, of the District of Columbia Code.

The judgment of conviction was entered and a sentence of 20 to 60 months on Counts 1, 2, 5, 6, 7 and 8 was imposed on February 28, 1963. The sentences on the counts are to run concurrently.

On July 12, 1963, the United States Court of Appeals for the District of Columbia Circuit allowed Appellant to prosecute his appeal without prepayment of costs.

This Court has jurisdiction under 28 U.S.C.A., Pars. 1291 and 1915, and Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

1. After a first trial which resulted in Appellant's conviction on December 15, 1960, under four counts of forgery and four counts of uttering (22 D. C. Code 1401 (1961)), this Court reversed and remanded the cause for prejudicial error in admitting on the trial as Government Exhibit No. 6 for handwriting comparison purposes, a card which contained handwriting samples given by Appellant to District of Columbia police while in police detention, and which also contained statements evidencing Appellant's prior arrests. Leigh v. U. S., 308 F.2d 345, 113 U. S. App. D. C. 390. Following the remand, a new jury was sworn, and the second trial resulted in a mistrial (as explained infra). On his third trial Appellant was convicted under six counts of the indictment (Counts 1, 2, 5, 6, 7, and 8), and was sentenced to from 20 to 60 months

under each count, to run concurrently. Prior to the third trial, on January 9, 1963 Appellant filed a Motion to Suppress Evidence, specifically all handwriting sample cards (and any copies thereof) which were filled out by him after his arrest and while he was in the custody of District of Columbia police on or about September 2, 1960. This motion was supported by attachments thereto consisting of Appellant's affidavit as to the facts in support of the motion, and a copy of one of the sample handwriting cards.

2. The facts presented in this motion and affidavit, or which otherwise appear of record, are as follows:

(a) A complaint was filed against Appellant in the U. S. District Court for the District of Columbia on June 28, 1960, charging him with "forgery". On September 2, 1960, at approximately 3:00 P.M., Appellant was apprehended by Fairfax County police in Fairfax, Virginia, and was taken by them before a Fairfax County magistrate for the apparent purpose of obtaining his removal to the District of Columbia, presumably pursuant to procedures established under 18 U.S.C. 3041 and Rule 40(a) of the Federal Rules of Criminal Procedure. At this point Appellant waived a removal hearing. Neither at this time nor later was Appellant advised of his right to be represented by or to consult with counsel, or of his constitutional right to remain silent, as would be required by Rule 5(b), F. R. Criminal Procedure, in an appearance before a United States Commissioner (I Supp. Tr., pp. 4, 8).[1/]

1/ Since the record includes three separate transcripts, we have identified the trial transcript with the symbol "Trial Tr.", the supplemental transcript of the January 18, 1963 suppression hearing with the symbol "I Supp. Tr.", and the supplemental transcript of the second trial held on February 7 and 8, 1963, which resulted in a mistrial, with the symbol "II Supp. Tr.".

(b) After waiving removal proceedings before the state magistrate, Appellant was turned over to District of Columbia police officers. At about 7:00 P.M., then four hours after his arrest, Appellant was taken by the District of Columbia police into the District of Columbia, and was questioned at police headquarters, Precinct No. 1. After an hour or so of questioning, Appellant was asked by Detective Sergeant Kapsol, who was questioning him in the check squad office, to fill out two information cards for the purpose of giving the police a sample of his handwriting. When Appellant initially refused to fill out the cards, he was told by Sergeant Kapsol that "there are other ways of making you fill them out", or words to that effect. Appellant understood this to mean that if he refused to fill out the cards, physical force would be employed to compel him to do so, and he did in fact then complete two handwriting sample cards at about 8:30 P.M. that same day, September 2nd. (I Supp. Tr., pp. 5-6). One of these cards subsequently became the Government's Exhibit No. 6 at the December 15, 1960 trial, and its admission was the basis of the prior reversal. As described below, a photographica copy of portions of this card was later introduced in the instant trial as Government Exhibit No. 6.

(c) At no time in the five and a half hours that had elapsed since his arrest, and neither before nor during his questioning by District of Columbia police officers, was Appellant advised of his right to be represented by or to consult with legal counsel, nor of his constitutional right to remain silent, including his right not to fill out the handwriting sample cards. Neither was he advised that the handwriting sample cards or anything he said in response to the interrogation by the police

officers might later be used as evidence against him in a criminal trial.

(d) According to notations made on the reverse side of the complaint, Appellant was given a preliminary hearing the next day (September 3, 1960) at 9:51 A.M. before Judge Howard of the then Municipal Court after being held overnight by the police. On the preliminary hearing the next day, Judge Howard committed Appellant to jail in default of a recognizance of $5,000.00. An indictment was filed on September 7, 1960, and a true bill was found by the grand jury on October 3, 1960, charging him with four counts of forgery and four counts of uttering checks in the District of Columbia. On October 7, 1960, Appellant was arraigned and pleaded not guilty on all counts.

3. In Appellant's Motion to Suppress and in his testimony on the hearing on the Motion it was pointed out that the handwriting sample cards were not voluntarily filled out by him, but were filled out as the result of an implied threat of physical harm made by a District of Columbia police officer in whose custody he was being held, and that they were filled out before Appellant had been informed of his constitutional right not to do so, or that the cards might later be used against him, or that he had a right to be represented by legal counsel (I. Supp. Tr., pp. 4-6). Appellant's motion further pointed out that the handwriting sample cards contain information which is objectionable and inadmissible as evidence against him, and that this information could not be eliminated from the cards in such a way as to remove completely its prejudicial effect on his case. This card, executed in compliance with directions given Appellant by Detective Sergeant Kapsol was appended to the motion. Aside from data relating to his past arrest record, other information about his past life, his birth and

education in Germany, and his employment is included. Among other items, the card includes as his "Previous employer", "the Bell Haven Country Club". Each of the checks upon which the counts were based was signed by "Ben Hilliard, Jr., Mgr. Bell Haven Country Club", and Mr. Hilliard later testified as a key Government witness against Appellant on the trial (Trial Tr. 14-22). The card indicated as Appellant's bank, the "American Trust", presumably the "American Security & Trust Company", named as payor on each of the checks on which the counts are based, and the endorsement of that bank appears on the reverse side of each check. Finally, the card includes a sample check on which Appellant had indicated as payor, the "American Security Trust" in Washington, D. C., and himself as payee. Acting on the direction of the police officer, Appellant had signed the name of "Ben Hillard, Jr." on this sample check. This sample check was a substantial duplication of the checks which Appellant was charged with forging and uttering.

4. Appellant's Motion to Suppress was heard and denied on January 13, 1963, by District Court Judge Pine. The Court's ruling on the Motion was made after hearing the testimony of Appellant as to the circumstances under which he had executed the documents in a District of Columbia Police squad room, as well as the conflicting testimony of Police Sergeant Kapsol in whose presence Appellant had executed these documents some 5-1/2 hours after his arrest, after an hour or so of interrogation by this police officer in the squad room and many hours before he was given a preliminary hearing the following day. That evidence is summarized in Section I of our Argument, infra.

5. On February 7, 1963, this case came on for a second trial and a new jury was sworn. During his opening statement to the jury, the

prosecutor explained the 8-count indictment to the jury [2/], following which the jury was recessed until the following day (II Supp. Tr., p. 6). Defense counsel then renewed his motion to suppress the handwriting sample cards on the basis that they were not procured through the voluntary act of the defendant but as the result of "an implied threat on the part of the police officer, who took the sample from him" and "that there is some inflamatory information" on the handwriting sample, which, even though "blacked out" by the Government, would arouse the suspicions of the jury and therefore prejudice the defendant. The Court pointed out that Judge Pine had already ruled on the point (Ibid, p. 7). The next day, February 8, 1963, the prosecutor informed the Court that it was necessary that he move to dismiss Counts 3 and 4 of the indictment for the reason that a necessary witness to prove those counts could not be found. The prosecutor further explained that since he had been involved in another trial "I have not had a chance to do everything I wanted to do in this regard" and "this is not my case to begin with" (Ibid, p. 10). The prosecutor also explained that this action also necessitated deleting certain material relating to Counts 3 and 4 from a photographic exhibit which he proposed to offer, a procedure which the defense attorney pointed out would suggest to the jury in viewing the exhibit that there had been other counts. Defense counsel suggested the possibility that the exhibit might be cut up into pieces, thus separating the various check photographs on the Government exhibit (Ibid, p. 13).

2/ The reporter's incomplete transcript does not fully reflect the prosecutor's explanation of the indictment to the jury. It is, however, clear from that part of the proceedings which were reported that the prosecutor explained all eight counts to the jury after they had been sworn (I Supp. Tr., pp. 3, 14).

A colloquy then ensued as to whether anything had been already said to the jury in the opening statement suggesting to them that two other counts were involved. The trial judge recalled from his notes that the prosecutor had in fact described all eight original counts (Ibid, p. 14). The Court then said (Ibid, p. 15), "I can see no prejudice in that" and "Before we get too much invested in this case, I want to know if there is going to be any issue raised on that?". Defense counsel pointed out that the prosecutor had also mentioned the restaurant involved in Counts 3 and 4, and although the prosecutor agreed with this, the Court said that this did not appear in his notes (Ibid, p. 15). Defense counsel then moved for a mistrial on the basis that he prosecutor had mentioned the dismissed counts to the jury and to allegations concerning the checks involved in those counts, and "for this reason we feel that the jury will be prejudiced and we move for a mistrial". The prosecutor then made a statement to the effect that this was not his case originally, he had been busy with another case and "I did not have an opportunity to realize I would have to dismiss those two counts until after I came before Your Honor yesterday afternoon and made my opening statement". On this basis he made a disclaimer of responsibility in the Government "for the causation of a mistrial" (Ibid, p. 16). The Court then granted both the mistrial motion and the motion to dismiss Counts 3 and 4 (Ibid, pp. 17-18).

6. The case was again called for trial on February 11, 1963, and a third jury was sworn to hear the case. At this trial the handwriting sample card and a photographic copy thereof (which did not include all of the material on the original card (Trial Tr. 43)) were used by an expert witness, James Miller, the Chief Questioned Document Analyst for the D. C. Police Department, for the purpose of identifying the handwriting on the three

checks (Gov't. Exs. 1, 2, and 4) involved in the six remaining counts (Trial Tr., pp. 38-51). Although the handwriting sample card was marked for identification as Government Exhibit 5 and was described to the jury by two witnesses (Trial Tr., pp. 30-31, 37-38, 35-36, 53-54) and was used for comparative purposes by Mr. Miller in identifying petitioner's handwriting on the three checks (Trial Tr., pp. 39-40, 51), the handwriting card was not offered in evidence nor apparently shown to the jury (Trial Tr., p. 54). The photographic copy of the handwriting sample card was, however, received in evidence as Government Exhibit 6 over objection of defense counsel (Trial Tr., pp. 54-55). Witness Miller explained to the jury that the photographic reproduction of the handwriting sample card (Gov't. Ex. 6) did not show the entire card because (Trial Tr., p. 43), "I wanted to cut out some things that were not pertinent to the checks so you wouldn't have too much to look at to distract you". The handwriting analysis was made by comparing words on the checks with the same words Appellant had been forced to write on the handwriting sample cards, and witness Miller made frequent references to the name of Ben Hilliard, Jr., Manager of Belle Haven Country Club, as appearing both on the handwriting sample card and on the three checks. Witness Miller also mentioned information taken from the card to the effect that Appellant was educated in Europe (Trial Tr., pp. 41, 49).

7. After the third trial, counsel for Appellant moved to dismiss the forgery counts of the indictment on the basis that despite the allegations of the indictment that such alleged forgeries were committed in the District of Columbia, the Government had produced no evidence that such was the case, but had only adduced evidence to the effect that the various checks

were passed in the District of Columbia. This motion was denied by the presiding judge on February 19, 1963. Testimony adduced on the trial showed that Appellant had been arrested in Virginia (Trial Tr., p. 32) where he had lived and worked for various periods (Trial Tr., pp. 20-21). Appellant, in fact, was employed in Vienna, Virginia, at the time of his arrest (Trial Tr., pp. 53-54). Government witness Robbins, in identifying a $35.00 check (Gov't. Ex. 1) as one that he had cashed at Karl's Caterers in the District of Columbia on June 28, 1960, testified that the face of the check was fully completed and the endorsed name of Richard E. Leigh (the name of the Appellant) was already on the check when it was presented to him for payment (Trial Tr., p. 6). Government witness Chloe Cologne in identifying a second check for $25.00 (Gov't. Ex. 2) as one that she had cashed on July 7, 1960, at the Savoy Florist Shop in the District of Columbia, likewise testified that when she received it, the check had been already fully made out, and was already endorsed with the name Richard E. Leigh (Trial Tr., p. 12). Government witness Sabagh in identifying the third check in the amount of $85.00 as one he had cashed at the Piccolo Restaurant in the District of Columbia on June 18 or 19, 1960, apparently identified it as fully made out on its face when presented to him, but stated that Richard Leigh, the Appellant, wrote his own real name on the endorsement in the witness's presence (Trial Tr., pp. 25-26). The Court in its charge to the jury as to the elements of the crime of forgery under 22 D. C. Code 1401, made no reference to the fact that jurisdiction of the crime must be established in the District of Columbia as alleged in the various counts of the indictment (Trial Tr., pp. 62-63).

8. On February 12, 1963, following Appellant's conviction under the six remaining counts of the indictment, Appellant's counsel moved

for a new trial and/or for judgment N. O. V., alleging in part that Government Exhibit 6 had been improperly admitted in evidence, since the original card on which it was based had not been voluntarily furnished to the D. C. Police by Appellant, and also that the motion to dismiss the forgery counts (Counts 1, 3, and 5) had been improperly denied by the Court. This motion was denied by Judge Keech on February 12, 1963. On February 28, 1963, Appellant was sentenced from 20 to 60 months under each of the six counts to run concurrently.

STATEMENT OF POINTS

1. The denial of Appellant's pre-trial Motion to Suppress certain so-called handwriting sample cards (in the form of incriminating questionnaires) which Appellant was forced to execute under duress and threats by a District of Columbia police sergeant many hours after his arrest, after prolonged interrogation in a police squad room, before he was advised of his constitutional rights, and before a preliminary hearing, constitutes reversible error.

2. Appellant, as an accused forger, was prejudiced before the jury when they were informed that he had executed a "sample" check on such a handwriting sample card which "sample" check was in form and text a counterpart of the checks he was being accused of forging, and by the fact that although the jury was shown only a photographic reproduction of the "sample" check, frequent references were made to the content of the original card by Government witnesses, and the jury was further informed that the original card which, though marked for identification was not shown them, contained other material supplied to the Government by Appellant.

3. The Government elicited no proof that the alleged forgeries were, as charged in Counts 1, 3, and 5 of the indictment, committed in the District of Columbia, and its evidence is consistent with the theory they were not. Since an essential ingredient of forgery under 22 D. C. Code 1401 is that the making or altering be committed within the District of Columbia which was neither proven nor charged, Counts 1, 3, and 5 were not proved. Since the crimes of "uttering" the same checks in connection with the same transactions as charged in Counts 2, 4, and 6, depend for their proof on the proof of forgery as charged in the companion counts, they, too, must fall for insufficiency of the evidence.

4. Appellant was placed in jeopardy by the swearing of a jury in a second trial. After the trial had commenced, and the prosecutor had explained all eight counts to the jury, the prosecutor moved to dismiss two counts on the basis that because of his preoccupation with another case, he had not been informed that the Government was not ready to proceed to trial on those counts. In this situation, defense counsel moved for a mistrial on the basis that the prosecutor had made the continuation of a fair trial impossible. Appellant's retrial before a third jury violated his constitutional right against being twice placed in jeopardy.

SUMMARY OF ARGUMENT

A. A complaint was filed against Appellant in the U. S. District Court for the District of Columbia on June 28, 1960, charging him with forgery. On September 2, 1960, at approximately 3:00 P.M., he was apprehended by state police and was taken before a state magistrate. Appellant waived a removal hearing before the magistrate and about 7:00 P.M. was turned over to two District of Columbia police officers,

who brought him to a squad room of the D. C. Police Headquarters where he was questioned by a police sergeant for an hour or more. Appellant was at no time advised of his constitutional rights or his right to counsel. Following the questioning by the police sergeant, Appellant was handed two so-called "handwriting sample" cards by the police sergeant which were actually questionnaires calling for extensive information about his past life and criminal record in addition to a "sample" check. On Appellant's refusal to execute the questionnnaires because of his fear of incrimination he was, according to his testimony, told by the police sergeant that they already had handwriting samples and "there are other ways of making you fill them out". Appellant, who was a deportable alien, understood this to mean physical force might be used to compel him to obey, and at about 8:30 P.M. that evening, filled out the cards, including a "sample" check which was a counterpart of the checks he was accused of forging. Appellant was not given a preliminary hearing in Municipal Court until the following morning. Appellant submits that the Court below erred in denying his pre-trial Motion to Suppress this evidence after hearing on the sole basis of the testimonial conclusion of his police interrogator that he had voluntarily executed the incriminating documents. The circumstances surrounding his act of self-incrimination strongly support the conclusion that he was acting pursuant to what he understood to be a threat after many hours of detention and interrogation. Haynes v. Washington, 373 U. S. 503 (1963); Bullock v. U. S., 74 App. D. C. 220, 122 F.2d 213 (1941). Regardless of the issue of overt threat moreover, the patent violation of Rule 5(a), F. R. Crim. P., invokes the exclusionary rule of Mallory v. U. S., 354 U.S. 449. Under circumstances where the only reason for holding an accused many hours after his arrest and before

preliminary hearing is to obtain incriminating documents and admissions, that rule is clearly applicable. Mitchell v. U. S., _____App. D. C. ____, 316 F.2d 354 (1963).

B. The use of an original handwriting sample card on the trial constitutes prejudicial error. Actually, only a photographic reproduction of the "sample" check on the card was shown to the jury during the testimony of Government witnesses. The jury were, however, advised that Appellant had executed this "sample" on the original card and that in form and content it was a counterpart of the checks he was being accused of forging. This "reenactment" of the alleged crimes in front of the jury constituted substantial prejudice. Such prejudice, moreover, was compounded by the fact that although the jury did not see the original card, it was marked for identification, Government witnesses made frequent references to its content, and the jury were advised that it contained other unexplained information not pertinent to the checks. The jury, however, was never advised as to the circumstances under which Appellant had executed the card.

C. The Court below erred in failing to grant Appellant's post-trial motion to dismiss the three forgery counts because of the failure of the Government to prove that such alleged crimes were committed in the District of Columbia as alleged in the indictment, and for failure of the Court to charge that such finding is a necessary ingredient of the crime of forgery under 22 D. C. Code 1401 which must be proved beyond a reasonable doubt. See: Nelson v. U. S., 97 App. D. C. 6, 227 F.2d 21, 24; 20 Amer. Jur., "Evidence", Sect. 152. The evidence showed that Appellant lived and worked in Virginia where he was arrested, and no evidence was elicited tending to establish the locus delicti in the District.

The Court also erred in failing to dismiss the three "uttering" counts, all of which depended upon proof that the same checks were forged as charged in the forgery counts. Dismissal of the forgery counts deprives the uttering counts of any evidentiary support in the record.

D. Appellant's trial and conviction before a third jury violated his right not to be placed twice in jeopardy. Following the previous remand of this case to the District Court, a second jury was sworn to try him on February 7, 1963, and at that point he was placed in jeopardy. Following the prosecutor's explanations of all counts of the indictment to that jury, on February 8, 1963, the prosecutor moved to dismiss two counts on the basis that because of his preoccupation with another matter, he had not ascertained prior to the swearing of the jury the day before that the Government was not prepared to proceed to trial on those two counts. After the Government's motion had been made and it was ascertained that the jury had already been advised concerning the dismissed counts by the prosecutor, Appellant's counsel took the only available course of discontinuing the trial which would be manifestly prejudicial to Appellant -- he moved for a mistrial. The Court granted both motions at the same time. The Supreme Court has very recently held that a defendant may be retried after a mistrial only "in very extraordinary and striking circumstances" (Downum v. U. S., 372 U.S. 734) and then only where "the prosecutor did nothing to instigate the declaration of a mistrial", Gori v. U. S., 367 U.S. 364, 366, fn. 7. Where, as here, the prosecutor himself creates a situation where the continuation of the current trial would be violative of the defendant's right to due process of law, the defendant's attack by motion on the continuance of the trial does not constitute a waiver of his constitutional guarantee against double jeopardy, since he

has "no meaningful choice", Green v. U.S., 355 U.S. 184, 191-2. The law will not impute a constructive waiver of this constitutional right from a defendant's challenge to the legality of a trial proceeding where no conscious and deliberate choice to stand trial again on the same indictment was made by the defendant. Green v. U. S., supra (355 U.S. at p. 192); Kepner v. U.S., 195 U.S. 100, 135; U. S. v. Tateo, 216 F.Supp. 850, 853 (S.D. N.Y. 1963).

ARGUMENT

I.

The Motion to Suppress Documentary Evidence Which Appellant Was Forced to Execute During a Period of Police Detention at a Time When He Had Not Been Advised of His Constitutional Rights, Should Have Been Granted.

Appellant submits that the pre-trial denial of his Motion to Suppress certain "handwriting sample" cards (i.e., questionnaires) which a District of Columbia police sergeant forced him to execute after police interrogation in a squad room of the District of Columbia Police Department constitutes reversible error. This key evidence was obtained from Appellant by this police sergeant on September 2, 1960, some 5-1/2 hours after his original arrest, at a time when he had neither been advised of his Fifth Amendment rights, including his right to counsel, nor his privilege against self-incrimination, and prior to preliminary hearing under the complaint (which was not held until the following day).

On the hearing on this motion before Judge Pine, Appellant testified and described his arrest by Virginia police officers at the Belle Haven

Country Club in Fairfax, Virginia, about 3 o'clock P.M. on September 2, 1960, the removal proceeding before a local Virginia magistrate in which he waived a removal hearing, and his subsequent return to the District of Columbia by two District of Columbia police officers. Appellant testified that neither at this removal proceeding nor at any time pertinent here was he advised of his constitutional rights including his right to counsel. He waived a removal hearing before the state magistrate after being told (I. Supp. Tr., p. 8), "The District of Columbia is waiting to take you back to the District and there is no sense in fighting extradition because it could be brought in there very easily anyway". The magistrate did not go into the case, and Appellant signed a waiver on the basis of the above-quoted statement. After this, at about 7:00 P.M., D. C. Police Sergeant Kapsol and another officer put Appellant in a squad car and drove him to the District of Columbia. There the officers took Appellant directly to the check squad room in Precinct No. 1, where he was first questioned in general terms by Police Sergeant Kapsol for about an hour or so. Then Sergeant Kapsol handed him two "handwriting sample" cards to fill out. Appellant was not advised of his right to counsel at this time or before. Appellant at first refused to fill out the cards, and explained that when he saw all of the questions on the cards he was being called on to answer (about his birth, his names, his prior arrests), "I balked at writing certain questions, because they might hurt me along in the trial. And then it came to trial lists. And then I started really jumping up. I didn't want to fill it out". Then Sergeant Kapsol told him that they had other writings taken from him and "there are other ways and means to make you fill out the cards". Appellant testified that because of this statement, "I understood that physical harm could be used or any other pressure could be put upon me" and he filled out the cards for this reason

(I Supp. Tr., pp. 4-6, 8-9, 11-13). Sergeant Kapsol had also informed Appellant that filling out such cards was the usual procedure followed by the Police Department in check cases (I Supp. Tr., p. 12). On the hearing, Appellant was cross-examined about his prior arrests (I Supp. Tr., pp. 6-7), and whether he as an alien had told Sergeant Kapsol in the police squad room that he wanted to go to Communist Germany - which Appellant denied having said (I Supp. Tr., p. 10). Police Sergeant Kapsol testified for the Government that he and Police Detective Shue had arrived at the Courthouse in Fairfax, Virginia, about 7:00 P.M. on September 2, 1960, after the removal proceedings had been completed (I Supp. Tr., pp. 15-16) (which would have been about four hours after Appellant had been arrested). Kapsol admitted that he and Detective Shue had then taken Appellant back to the check and fraud squad room, where Sergeant Kapsol began to type up "a statement necessary for line-up, process, to include the identification" (I Supp. Tr., p. 16). Kapsol said he asked Appellant about his birth in Germany and told him it would be necessary for him (Kapsol) to notify some embassy and asked Appellant whether he wanted the English or German Embassy notified. Kapsol testified that Appellant then indicated that "all he was interested in was getting back to Communist Germany". Kapsol testified that Appellant offered no objection to filling out the cards and denied he had made any threat. The two cards were shown to the Court. (I. Supp. Tr., pp. 18-20). Kapsol testified that during this interrogation of Appellant, no other police officer was present except himself. Kapsol also testified that Appellant had been advised of his right to counsel while riding in the D. C. Police Squad car from Virginia, that Appellant was advised to the effect that he did not need to fill out the cards, as "We advise all our prisoners" (I Supp. Tr., p. 21). On the conclusion of this

testimony, defense counsel moved to suppress the handwriting cards as involuntary and violative of Appellant's Fifth Amendment rights. Another basis for the motion was that since some of the information on the cards was "blacked out", this would "arouse the curiosity of the jury and thereby prejudice them against the defendant in that they would wonder what was under there and think that it might possibly be something prejudicial". (I Supp. Tr., p. 22). The Court denied the motion, finding "that the card was filled in voluntarily", and overruled the objection that its introduction with part of the content "blacked out" would prejudice Appellant before the jury (I Supp. Tr., p. 23).

Appellant submits that the circumstances of this case do not support the conclusion of the District Court Judge that the so-called "handwriting sample" cards (which as explained were in reality questionnnaires seeking extensive information which could have no relation to a mere sample of handwriting) were "voluntarily" given by the Appellant. This key evidence was wrung from this Appellant after he had been held for approximately five-and-a-half hours without benefit of counsel or being advised of his right to counsel and his privilege against self-incrimination and the day before he was taken before a Federal committing magistrate for preliminary hearing. It is significant that none of the usual reasons given for police interrogation as justification for an "unnecessary delay" in taking Appellant before a committing magistrate were present in this case. A forgery complaint had been outstanding against Appellant at the time of his arrest by Virginia State Police for many months, and Appellant had been clearly identified prior to his removal from Virginia by D. C. Police Officers. His secret squad room interrogation by Sergeant Kapsol, who held him without benefit of counsel, could only have been for the purpose of

coercing him to give incriminating statements against himself, and Sergeant Kapsol's testimony in fact corroborates this conclusion (I Supp. Tr., pp. 16-17). Regardless of other considerations, "Pending a hearing before a magistrate who informs the suspect of his rights, the police may not 'carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt' ", Mitchell v. U. S., _____ App. D. C._____, 316 F.2d 354, 357 (1963). The secret interrogation of Appellant in the police squad room 5-1/2 hours after his arrest was obviously for the sole reason of forcing incriminating statements and documents from him, and could have been for no other reason. These facts give rise to two separate theories of exclusion.

First, under Appellant's testimony, he was coerced into giving the damaging evidence through what he understood to be threats or implied threats, and therefore the evidence was extracted from him in violation of his privilege against self-incrimination and his right to be secure against unreasonable searches and seizures and the essential concepts of fairness incorporated in the due process clause of the Fifth Amendment. Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U. S. 315; Stein v. New York, 346 U. S. 156, 182; Bullock v. U. S. , 74 App. D.C. 220, 122 F.2d 213 (1941); U. S. v. Townsend, 151 F. Supp. 378, 384-5 (D. D.C. 1957). In meeting this issue of "voluntariness" the Government offered only the secret interrogator, Sergeant Kapsol, on the suppression hearing. While not otherwise germane to the suppression hearing, the Government's attempt to bring out Appellant's past criminal record and to place upon him the stigmata of being an alien sympathizer of German Communism, is the antithesis of Kapsol's explanation of Appellant's

willing cooperation with him in furnishing incriminating evidence against himself after a secret interrogation session of an hour or more in the police squad room. This theory requires acceptance of the view that an accused who had, according to the Government, a criminal record and extensive experience with police procedures, and who was, moreover, a deportable alien (as Sergeant Kapsol pointedly reminded him), voluntarily cooperated with a police sergeant after 5-1/2 hours of detention in filling out an incriminating questionnaire which not only contained information about various facets of his past life and activities, but which included the execution of a "sample" check which in form and content was a counterpart of those he was accused of forging and uttering. This theory is not only contrary to human experience but is not supported by Kapsol's ipse dixit to the effect that these documents were voluntarily executed. Whether an accused waives his constitutional rights "voluntarily" calls for a conclusion as to his subjective state of mind at the time. This conclusion in turn requires consideration of all surrounding facts which could have influenced his choice as of that time. See: Haynes v. Washington, supra; Spano v. New York, supra; Leyra v. Denno, 347 U.S. 556, 558. The factual circumstances surrounding Appellant's act of self-incrimination, as explained in the Statement above, point logically to the fact that his will had been broken down by the time that he took pen in hand and proceeded to furnish the key evidence against himself after many hours of detention. As a deportable alien in the control of a police sergeant who took it upon himself to make all the explanations of Appellant's position to him during a long period of interrogation, he was particularly vulnerable to coercive tactics. Under these circumstances, it cannot be rationally concluded that Appellant was not at least subject to that kind of coercive pressure which for him rendered

his incriminating action involuntary. Compare: Spano v. New York, supra. Against this background of circumstances (which was not adverted to by the District Court in denying the motion), Appellant's testimony that his incriminating acts were influenced by what he then understood to be an implicit threat, should be credited over Sergeant Kapsol's conclusionary testimony to the contrary, indulging the well established presumption against waiver of constitutional liberties by an accused in the hostile atmosphere of secret police interrogation.

The Court's conclusion as to the voluntariness of the execution of the incriminating documents does not dispose of the matter, moreover. Regardless of the presence or absence of express or implied threat, under the circumstances of this case the law will impute an involuntary character to the incriminating evidence in view of the obvious violation of Rule 5(a), F. R. Crim. P. In the circumstances of this case there was clearly an "unnecessary delay" invoked in taking Appellant before a Federal committing magistrate who could have warned him of his constitutional right to counsel and of his right to remain silent. Mallory v. U. S., 354 U.S. 449; Mitchell v. U. S., _____App. D.C. _____, 316 F.2d 354 (1963). Not only was there a 5-1/2 hour period between original arrest and the execution of the incriminating documents, but Appellant was not given a preliminary hearing in the Municipal Court until the day following these events. The "Mallory rule" has been formulated on the background of both the Fifth Amendment privilege against self-incrimination and "the well recognized right of an accused when arrested to be promptly taken before a magistrate who shall inquire into the sufficiency of the basis for his arrest, advise him of his rights, and determine whether he shall be admitted to bail and on what conditions". Killough v. U.S.,

_____App. D.C. _____, 315 F.2d 241, 242 (1962). In circumstances where police action is shown to have been for the purpose of obtaining incriminating evidence from the accused after many hours of detention and interrogation, the underlying constitutional basis for this rule is particularly significant. This Court's opinion in Mitchell v. U. S., supra, disposes of any contention that police are entitled to interrogate suspects in the late afternoon and evening hours and to hold them in police detention for that purpose until court convenes the next day. The evidence and all copies thereof should have been excluded in their entirety under these decisions cited above.

II.

The Use of the Original Handwriting Sample Cards on the Trial Constituted Substantial and Prejudicial Error.

As shown in the Statement above, only a photographic reproduction of parts of the handwriting sample cards was actually introduced in evidence (Gov't. Ex. 6). The original handwriting sample card (which, as explained, was in reality a long questionnaire containing incriminating information which had no conceivable relation to handwriting analysis) was marked for identification (Gov't. Ex. 5) in the presence of the jury, and was extensively used and adverted to by a handwriting expert in identifying and comparing the writing on the questioned checks in his testimony before the jury. While the jury was not shown the original document, information from that document was included in the witness's testimony to the jury, and the jury was advised that Appellant had executed a sample check on the original document which was in substance a duplication of the allegedly forged checks. The witness, for

example, referred in his testimony to the jury to the name of Ben Hilliard, Jr., Manager of Belle Haven Country Club, as appearing both on the original document and on the three allegedly forged checks. The only explanation made by the Government witness to the jury for not showing them the entire original card was because (Trial Tr., p. 43), "I wanted to cut out some things that were not pertinent to the checks so you wouldn't have too much to look at to distract you". In short, the jury was advised that:

(a) Appellant, as an accused forger, had executed an original document which they did not see which contained unexplained information "not pertinent to the checks",

(b) This original document also contained a "sample" check executed by Appellant as an accused forger who had signed the name of Ben Hilliard. Jr. on this sample,

(c) That the "sample" check which Appellant had made out was in text and form a counterpart of the very checks he was then accused of forging, and that Appellant had, in executing this check, used the signature of Ben Hilliard Jr., whose name also appeared on the allegedly forged checks.

Then the witness was allowed not only to use a photographic reproduction (Gov't. Ex. 6) of this so-called "sample"check in establishing similarities in handwriting, but to make extensive references to the manner in which Appellant had executed the "sample" check on the original document which they did not see. Since the Government's entire case rested on this comparison, the issue of the prejudicial effect on the jury of these procedures is of crucial importance in this case.

Bearing in mind that the Government was seeking to establish Appellant's guilt as a forger, evidence submitted to the jury that he had executed a counterpart "sample" check on an unexhibited document and under circumstances not explained to the jurors, could only have suggested to them the fact of Appellant's guilt. There is no more prejudicial act in the eyes of a jury than a reenactment by the accused of the very crime for which he is being tried! If an accused murderer were made to reenact the murder in front of the jury the point would be crystal clear. There is no substantial difference in showing to the jury in a forgery case documentary material prepared by the accused himself constituting a reenactment of the alleged forgery. In addition moreover, the jury was told that Appellant had supplied other unexplained data on the unexhibited "handwriting sample" card which was "not pertinent to the checks". This suggested (with actual justification) that other incriminating evidence furnished by the Appellant's own hand was in the possession of the prosecutor -- a suggestion which in many ways is more damaging than showing the jury the complete original document. The total effect on the jury could only have been to prejudice it against Appellant. See: Kotteakos v. United States, 328 U.S. 750, 765.

III.

The Indictment Should Have Been Dismissed for Failure of the Government to Prove that the Forgeries Charged in Counts 1, 3, and 5 of the Indictment Were Committed in the District of Columbia.

As shown above, at no point did the Government adduce any evidence that any of the three checks were forged in the District of Columbia as charged in three counts of the indictment. Under the evidence, at the time that the three checks were presented in each of

the three instances, the checks had been fully completed on their face, and in two instances the checks had already been endorsed. The alleged endorsement of Appellant's own name on the completed check in the third instance did not constitute the forgery alleged since such endorsement did not constitute false making or altering. Moreover, the Court in its charge to the jury did not advise them of the necessity of finding that the forgeries charged had to be perpetrated in the District of Columbia. Since Appellant was employed in the State of Virginia, and apparently lived there, and was finally arrested there, the evidence does not show that the forgeries were committed in the District of Columbia. The evidence is equally consistent with the theory that if such checks were forged as alleged, they were forged in Virginia. It is elementary that jurisdiction of the crime of forgery under 22 D. C. Code 1401 can lie only in the District of Columbia. Huntington v. Attrill, 146 U.S. 657, Brown v. U. S., 35 App. D. C. 548.

As explained by the Court in its charge to the jury (Trial Tr., p. 63), under the statute the crime of forgery consists of the false making or altering of a check. The crime is not proved by evidence that such a check was only passed in the District of Columbia. Since the evidence did not show that the crime of forgery was actually perpetrated in the District of Columbia, the Court erred in not granting Appellant's motion to dismiss the forgery counts as not sustained by the evidence.

This point was raised in a Motion for a New Trial and/or Judgment N. O. V., which was denied by Judge Keech on February 18, 1963, in a margin reference to U. S. v. Britton, 24 Fed.Cases 1239, 1241. In that opinion Judge Story referred to a principle "that the place where an instrument is found or offered in a forged state, affords prima

facie evidence, or a presumption, that the instrument was forged there, unless that presumption be repelled by some other fact in the case". This case is readily distinguishable for several reasons. First, Judge Story was dealing with the dissimilar problem of the proof of venue of a Federal crime under a statute of national scope relating to instruments of the Bank of the United States (3 Stat. 275). See: Conley v. United States, 23 F. 2d 226 (C. A. 4, 1928). Even in respect to that problem however, Judge Story observed that if the crime of forgery was not committed in the District of Massachusetts, the court had no jurisdiction over the offense, and (24 Fed. Cases at p. 1241), "I agree also, that this is a fact to be established, at least by prima facie or presumptive proof by the prosecutor, and that the onus probandi rests on the government. But it appears to me, that such prima facie or presumptive proof is offered by the government in this case". If the issue of proving venue jurisdiction of a Federal offense were here involved, reference to recent Supreme Court cases would indicate a stricter standard of establishing the locus delicti than on the basis of a mere presumption. Cf. Travis v. United States, 364 U. S. 631; United States v. Johnson, 323 U.S. 273, 276.

Venue does not necessarily affect the substantive jurisdiction of a Federal court (in respect to criminal acts proscribed by general Federal laws wherever committed), and is not necessarily a constituent ingredient of a Federal criminal statute (and in fact may be waived). A different case is presented, however, where proof of the locus delicti controls both the substantive jurisdiction of a court of limited jurisdiction to try the crime, and is also a constituent element of the statutory crime itself (i.e., where the application of the statute and criminality of the act proscribed depend on proof that it was committed within a particular

district or enclave). Here Appellant has been charged with committing crimes proscribed by 22 D. C. Code 1401, and unless it is proved that such crimes were committed within the territorial boundaries of the District of Columbia, the statute is inapplicable. In short, an essential ingredient of proof of a violation of 22 D. C. Code 1401 is proof that such violations were committed within the District of Columbia. This follows a fortiori from the fact (1) that this statute is only applicable to crimes committed within the territorial limits of the District of Columbia for which Congress was legislating, and (2) that in trying such a case, the United States District Court for the District of Columbia is sitting as a court of limited jurisdiction with "...cognizance of all crimes and offenses committed within said District..." (11 D. C. Code 301). If the Government has not proven beyond a reasonable doubt the jursidictional fact that the crimes of forgery were committed within the District, it has failed to establish the corpus delicti of forgery as alleged in the indictment. The applicable principle may be stated as follows:

> "The criminality of an act consists not only in its perpetration, but in its being perpetrated in violation of the penal laws of the place where committed. It is clear, therefore, that the fact and place of perpetration are both ingredients of the crime and must be proved by the prosecution in order to convict the defendant." (20 American Jurisprudence, "Evidence", Sect. 152)

In the trial of a violation of the penal provisions of the District of Columbia Code, the Government must not only prove the jurisdictional fact that the violation occurred in the District of Columbia, but the Court must charge the jury that it must find beyond a reasonable doubt that the offense charged was committed there. Compare: Nelson v. United States, 97 App. D. C. 6, 227 F. 2d 21, 24 (1955); Simms v. United States,

101 App. D. C. 304, 248 F.2d 626, 628, certiorari denied Duncan v. United States, 355 U. S. 875. This is a jurisdictional requisite that cannot be waived.

If, as we contend, the three forgery counts should have been dismissed for failure to prove or charge the requisite locus delicti in the District of Columbia, there is also a failure of proof under the uttering counts, since, as the trial judge explained to the jury, the crimes of "uttering" as defined in 22 D. C. Code 1401, depend for their proof on a showing that the same checks identified in the three forgery counts were falsely made or altered (Trial Tr., pp. 64-66). Since proof of the essential ingredients of the three crimes of "uttering" (i.e., that the three checks were forged) is dependent on evidence adduced under the forgery counts, the dismissal of the latter counts would result in a failure of proof under the former. This is not comparable to other instances where some counts of an indictment rest on a body of proof independent of dismissed counts and are not affected by such dismissal. The "uttering" counts here were dependent on the evidence adduced under the forgery counts that forgeries were committed as charged. Absent the latter, the "uttering" counts must also fall since proof of the forgeries was, as shown, essential to support the inter-related charges of uttering the same instruments in the course of the same transactions. 3/

3/ This is not to say that the Government could not have elected to charge only the single crime of "uttering" in the first instance. Read v. United States, 299 Fed. 918, 55 App. D. C. 43; Simon v. U.S., 37 App. D. C. 280. But since it elected to separate each single transaction into two criminal counts, it has linked the proof of uttering each check to proof under another count that the same check was forged in such a way as to make the "uttering" counts dependent upon proof of the forgery counts.

IV.

Appellant Was Twice Put in Jeopardy When after a Second Trial Resulted in a Mistrial, He Was Convicted on a Third Trial.

Appellant submits that his third trial resulting in the conviction here appealed from violated his right not to be twice placed in jeopardy for the same offense guaranteed to him by the Fifth Amendment. As explained in the statement supra, Appellant was brought to trial a second time on February 7, 1963, and a second jury was sworn. At that point jeopardy had attached within the meaning of the Fifth Amendment. United States v. Watson, 3 Ben. 1, F. Cas. No. 16651 (D.C. N.Y). The prosecutor then proceeded to make his opening statement to the jury which included references to Counts 3 and 4 and to factual allegations therein. The trial was continued until the next day, February 8, 1963. At that time the prosecutor moved to dismiss Counts 3 and 4 on the basis that the Government was not ready to proceed to trial under those counts, a fact which he explained had not been investigated prior to February 7th because of his personal preoccupation with another case. After it had been agreed that the jury had already been told about these counts, defense counsel moved for a mistrial on the basis the jury had been prejudiced. The Court thereafter granted both the prosecutor's motion to dismiss Counts 3 and 4 and the motion for a mistrial. Appellant was thereafter placed on trial a third time on February 11, 1963, resulting in his conviction now appealed from.

The basic issue presented is whether Appellant, after being placed in jeopardy in the February 7-8, 1963 trial, "waived" or otherwise relinquished his constitutional right against being again placed in

jeopardy in respect to the third trial. As the Supreme Court has very recently held in Downum v. U. S., 372 U.S. 734 (April 22, 1963), the practice of retrying a defendant after a mistrial is to be exercised "only in very extraordinary and striking circumstances" and any doubt will be resolved "in favor of the liberty of the citizen". The Downum opinion specifically rejected the broader interpretation given the jeopardy provision in other circuit court decisions.

The Supreme Court did, however, accept the holding of Cornero v. U. S., 48 F. 2d 69 (C. A. 9, 1931), that where a jury is discharged because prosecution witnesses are not available at the time of the trial, the defendant cannot thereafter be tried under the indictment a second time. In this case as in Cornero (p. 71) "... when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. * * * The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy". See also: United States v. Watson, supra. Those cases where a second trial is permitted after mistrial involve instances where "the prosecutor did nothing to instigate the declaration of a mistrial", Gori v. U. S. 367 U. S. 364, 366, fn. 7. In the Gori case, the Supreme Court held that a defendant could be retried after the trial judge had declared a mistrial for his benefit sua sponte, but did so on the basis of a finding that the prosecutor's conduct in that instance was "unexceptionable" and that the reasons for the mistrial were, therefore, not "entirely clear" (367 U. S. at p. 366). In this case the prosecutor did "instigate the declaration of a mistrial" by his act in moving to dismiss two counts of the indictment after the jury had been

sworn and had been advised of the two counts, thereby creating a situation where the continuation of the trial before that jury would have prejudiced Appellant and precluded his fair trial by an impartial jury.

The fact that it was defense counsel who technically made the mistrial motion is a matter of formal procedure rather than substance, and does not take this case out of the recent rulings cited above. When the motion was brought, the prosecutor had already created the situation making continuation of trial under circumstances of essential fairness a legal impossibility. However labeled (and the label itself is not controlling), the essence of Appellant's motion was an objection to the continuation of the pending trial because of prejudice created by the actions of the prosecutor. Neither by word nor by implication was it a consent to a retrial before another jury.[4/] It cannot logically be maintained under these circumstances that by moving for a discontinuance of the trial under the technical lable of a "motion for a mistrial", the Appellant could be deemed to have "waived" his constitutional right against again being placed in jeopardy. By seeking to avoid the continuation of a trial which would be manifestly unjust and violative of his right to due process of law secured by the Fifth Amendment, Appellant cannot be said to have voluntarily and consciously relinquished his guaranteed protection under the same constitutional amendment not to be retried. This Appellant, like the Appellant in Green v. United States, 355 U. S. 184, 191-192, "had no meaningful choice". The Supreme Court in the Green case approved (355 U. S.

4/ This motion is therefore clearly distinguishable from one in which the motion for mistrial, in substance, seeks a second trial because of some disability of the defendant such as illness, inability to procure defense witnesses, or some other circumstance not created by the prosecutor himself.

at page 192) the following language of Mr. Justice Holmes (in Kepner v. United States, 195 U. S. 100, 135):

> "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

The Supreme Court in rejecting this paradoxical contention noted (355 U. S. at p. 191), " 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment".

The Supreme Court's similar rejection in Green of "a narrow, grudging application" of the Fifth Amendment guarantee (355 U.S. at p. 198) precludes the highly technical argument that "waiver" of such rights is to be implied from the technical fact that Appellant moved for the mistrial as the only procedural course he could follow to abort a trial which would have been violative of his Constitutional rights to due process of law and a fair trial by jury. Construction of the former jeopardy provision is based on matters of substance and not on the technicalities of procedure. Where double jeopardy is at issue, "It cannot matter that the prisoner procures the second trial." United States v. Tateo, 216 F. Supp. 850, 853 (S. D. N. Y., 1963). What does matter here (unlike the situation in Gori) is that it was the prosecutor who made the continuance of the first trial legally impossible. Since the Government was not able to procure a conviction on that trial, it should not have another chance to do so after the Appellant had already been placed in jeopardy.

CONCLUSION

Wherefore, the premises considered, Appellant prays that his conviction be reversed.

Respectfully submitted,

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Appointed by this Court

BRIEF FOR APPELLEE

United States Court of Appeals For the District of Columbia Circuit

No. 18,025

RICHARD E. LEIGH, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From The United States District Court For The District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented.

1. Did the trial court err in denying appellant's pre-trial motion to suppress evidence on the ground that it was obtained by police threats of physical violence where (1) appellant's testimony tending to establish coercion was contradicted by a police officer who testified that the handwriting specimen in question was given by appellant voluntarily after having been advised of his right not to give the writing and to consult with counsel?

2. Was improper use made of a handwriting specimen card during the trial?

3. Was appellant twice placed in jeopardy for the same offense where a mistrial was declared in a first trial upon his motion and with his consent? Can appellant raise the question of double jeopardy on appeal where it was never asserted by him at the second trial?

4. Should appellant's post-conviction motion to dismiss the three forgery counts of the indictment, on the ground that the Government's proof of venue was insufficient, have been granted where (1) the Government's evidence showed that three checks forged by appellant were uttered by appellant in the District of Columbia, and (2) appellant never indicated to the court during the trial that proof of venue was in dispute?

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TABLE OF CASES

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United States Court of Appeals
For the District of Columbia Circuit

No. 18,025

RICHARD E. LEIGH, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

**Appeal From The United States District Court
For The District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed October 3, 1960, charged appellant with four counts of forgery and four counts of uttering (22 D.C. Code 1401). After trial by jury, he was found guilty as indicted and was sentenced to a term of imprisonment of from three (3) to nine (9) years on each of the eight counts, the sentences to run concurrently (D.C. Cir. No. 17,066, J.A. 48). A direct appeal resulted in reversal of the judgment on the ground that a government handwriting exhibit had been erroneously received in evidence. *Leigh* v. *United States,* 113 U.S. App. D.C. 390, 308 F.2d 345 (1962).

A motion to suppress the handwriting exhibit was argued on behalf of appellant and was denied by the District Court on January 18, 1963 (1 Supp. Tr. 23).[1]

A second trial upon the eight count indictment began February 7, 1963. On the following day the court granted the government's motion to dismiss two counts of the indictment and the appellant's motion for a mistrial (11 Supp. Tr. 17-18).

A third jury found appellant guilty of the six counts (three forgery and three uttering) which remained in the indictment. A motion for a new trial was denied by the District Court on February 19, 1963, and by judgment and commitment filed February 28, 1963, appellant was sentenced to a term of imprisonment of from twenty (20) to sixty (60) months on each of the six counts, the sentences to run concurrently (see Record).

The Pre-trial Motion To Suppress The Handwriting Specimen

On September 2, 1960, appellant was arrested by Virginia police officers in Fairfax, Virginia. He waived a hearing before a local magistrate and was transported to the District of Columbia by detectives Kapsol and Shue of the Metropolitan Police Department. While in custody in the offices of the Check and Fraud Squad at Police Headquarters, appellant was given a form card which required certain information to complete. In his own handwriting appellant filled in the blanks opposite the various headings on the form card. Opposite the heading which called on him to "List other arrests", appellant wrote "Arrested for Checks, California, Nevada, New York". Other headings called on appellant to list certain personal information, to write the letters of the alphabet in small case and capitals, and to fill out a sample blank check. On this last item ap-

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[1] For the sake of uniformity in the briefs, appellee will adopt the transcript symbols employed by appellant. Trial transcript references will be identified with the symbol "Trial Tr.". References to the transcript of the hearing on the motion to suppress will be identified by the symbol "1 Supp. Tr.". References to the transcript of the second trial held on February 7 and 8, 1963 will be identified with the symbol "11 Supp. Tr.".

pellant signed his own name as payee and that of Ben Hilliard, Jr. as maker.

After this Court's opinion in *Leigh* v. *United States*, *supra*, and prior to the second trial, all reference to prior arrests was deleted from the card by placing a strip of black tape over the objectionable words (1 Supp. Tr. 20).

On January 10, 1963, appellant moved to suppress the handwriting specimen card as evidence on the grounds that (1) it was filled out as a result of police coercion, and (2) it was prejudicial and inflammatory even though all reference to appellant's prior arrests had been blacked out. At the hearing on this motion, appellant testified that he was given the handwriting card after "about an hour or so" at the Check and Fraud Squad; that he was not advised of his right to consult with counsel or of his right not to fill out the handwriting card and was not warned that the card might be used as evidence against him; that he was told by Detective Sergeant Kapsol: "We have enough handwriting specimens here on your papers and there are other ways and means to make you fill out the cards"; and that he then filled out the card because he "understood that physical harm could be used or any other pressure could be put upon me." (1 Supp. Tr. 4-5). Detective Sergeant Kapsol testified that appellant filled out the card voluntarily after having been advised that he did not have to do so and that he had a right to consult with counsel; and that no threatening words were spoken (1 Supp. Tr. 16-21).

The District Court found that the card was filled out voluntarily and that, with the references to the prior arrests covered over, it contained nothing inflammatory or prejudicial to appellant (1 Supp. Tr. 23). The motion to suppress was denied.

The Trial of February 7 and 8

Appellant's trial on the eight count indictment began on February 7, 1963. A jury was sworn, and the prosecutor proceeded to make an opening statement in which he referred twice to the indictment:

> ". . . the indictment in this case charges the defendant in some several counts with the crimes of forgery and

uttering, in the District of Columbia, in the year 1960." (11 Supp. Tr. 3).

"... we will ask you for a verdict of guilty as indicted on all the counts in the indictment." (11 Supp. Tr. 5)

No reference was made to the exact number of counts in the indictment or to the specific transactions which gave rise to those counts. Nor was any mention made of the witnesses involved in those transactions.

The court recessed following the opening statement. When it reconvened on February 8, the prosecutor informed the judge that, due to circumstances unknown to him the day before, a witness necessary to prove counts three and four of the indictment would be unavailable (11 Supp. Tr. 10). He therefore moved to dismiss those counts. At the conference which followed[2] both the judge and counsel for

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[2] The following colloquy took place (11 Supp. Tr. 14-17):

THE COURT: Before we get too deeply into this matter, Gentlemen, is there any question in the opening statement? You did refer to all the count?
Mr. Lowther: I did but I didn't say a number, if Your Honor pleases.
THE COURT: Do you have any question about it, Mr. Clinard?
Mr. Clinard: Well, I can't remember exactly what he said.
THE COURT: He said there were eight counts in the indictment.
Mr. Lowther: I said a number of counts. I tried to stay away from that.
THE COURT: I think you said four forgery and four uttering.
Mr. Clinard: Yes.
THE COURT: I can see no prejudice in that. Before we get too much invested in this case, I want to know if there is going to be any issue raised on that?
Mr. Clinard: I think, if Your Honor please, that the prosecutor mentioned the name, the restaurant.
Mr. Lowther: I named the restaurant and I have the witness here in the court this morning.
Mr. Clinard: Well, if he didn't mention the particular—
THE COURT: If there is any question, it would be easier to get another jury rather than have this case go back to the Court of Appeals or somewhere else.
Let me check my notes.
Off the record.

(Discussion off the record)

THE COURT: On the record.
My notes show that he mentioned the eight counts only.

appellant expressed the opinion that the prosecutor had referred to the specific number of counts in the indictment during his opening statement. Counsel for appellant, after consultation with appellant, moved for a mistrial on the ground that such a reference was a source of prejudice. Both the motion to declare a mistrial and the motion to dismiss counts three and four of the indictment were granted (11 Supp. Tr. 17-18).

Proceedings at the Trial of February 11 and 12

Mr. Lester H. Robbins, manager of Karl's Caterers, Incorporated, 2643 Connecticut Avenue, Northwest, District of Columbia, identified government's exhibit number 1 as a $35 check presented by appellant to him, for $6.35 in merchandise and the balance in cash, on June 28, 1960 (Trial Tr. 1-3). The name Ben Hilliard, Jr., appeared on the check as maker, and appellant's name appeared thereon as payee and endorser. The check was not signed in the

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Mr. Clinard: May I confer with the defendant in this case?
THE COURT: Yes, sir.

(Mr. Clinard conferred with the defendant)

Mr. Clinard: Your Honor, the defense will move for a mistrial on the ground that at the time of the opening statement yesterday the prosecution referred to 8 counts in the indictment and my recollection, if it serves me correctly, he referred to specific instances involving checks or a check which is in the indictment which is being dismissed and for this reason we feel that the jury will be prejudiced and we move for a mistrial.

Mr. Lowther: I would like for the record to show that this was not my case originally and I have been in trial for 8 or 9 days in a first degree murder case in front of Judge Hart. I did not have an opportunity to realize I would have to dismiss those two counts until after I came before Your Honor yesterday afternoon and made by opening statement. Thereafter, I talked to Mr. Titus who was home with a broken ankle and whose case this was and he advised me that I had to dismiss the 3d and 4th counts because the witness was not available.

I want the record to reflect that the government takes no responsibility for the causation of a mistrial. I don't think it is the government's fault, Your Honor.

* * * * *

THE COURT: The motion having been made by defense counsel and with the concurrence of the defendant, I declare a mistrial in this case.

presence of Robbins (Trial Tr. 6). Drawn on the American Security and Trust Co., the check was returned with the notation that the bank could not identify or locate the account.

Mrs. Chloe Cologne, co-owner of the Savoy Florist located at 2608 Connecticut Avenue, Northwest, identified government's exhibit number 2 as a $25 check presented by appellant to her, for $7.50 in merchandise and the balance in cash, on July 7, 1960 (Trial Tr. 10, 12). Hilliard's name appeared as maker, and appellant's name appeared as payee and endorser. The check was not signed in the presence of Mrs. Cologne (Trial Tr. 12). Drawn on American Security, the check was returned with the notation that the bank could not identify or locate the account. Mrs. Cologne identified government's exhibit number 3 as a sales slip she made out as a record of the purchase of flowers by appellant (Trial Tr. 12).

Mitchell G. Sabagh identified government's exhibit number 4 as an $85 check presented by appellant to him for cash on June 18 or 19, 1960, at the Piccolo Restaurant in the District of Columbia. Hilliard appeared as the maker of the check and appellant as the payee. In Sabagh's presence appellant placed his endorsement "Richard Leigh" on the back of the check (Trial Tr. 26). This check was also dishonored.

Mr. Ben Hilliard, Jr., manager of the Bell Haven Country Club, Alexandria, Virginia, testified that appellant had been employed at the club during the months of April, May, and June in 1960. He stated that government's exhibits 1, 2, and 4 did not contain any handwriting of his, although what purported to be his signature appeared on these checks as maker (Trial Tr. 16-19). He did not give anyone permission to sign his name as maker of any check, and neither he nor the club had an account with the American Security and Trust Company (Trial Tr. 16-19).

Detective Sgt. Alex Kapsol of the Check and Fraud Squad testified that appellant, while in custody on September 2, 1960, had given a specimen of his handwriting on a card

marked as government's exhibit number 5 for identification (Trial Tr. 30).[3]

James Miller, the Chief Questioned Document Analyst for the Metropolitan Police Department, testified that the card specimen of appellant's handwriting was turned over to him and that he compared the entire face of the card with the entire face of the three checks (government's exhibits 1, 2, and 4). As a result of this comparison he had formed the opinion that the person whose handwriting appeared on the card (appellant) had also written the entire face of the three checks, including the name Ben Hilliard, Jr. (Trial Tr. 43, 51). For purposes of explaining to the jury how he had arrived at this opinion, Miller had prepared a special exhibit (government's exhibit number 6). The upper section of this exhibit displayed a photographic reproduction of portions of the card specimen of appellant's handwriting;[4] the lower left quadrant of the exhibit displayed photographic reproduction of the signatures which appeared on the three checks and which purported to be that of Ben Hilliard, Jr.; the lower right quadrant of the exhibit displayed photographic reproductions of appellant's endorsements on the three checks (Trial Tr. 37-39). Using this exhibit, copies of which were distributed to the jurors without objection by appellant (Trial Tr. 37), Miller was able to demonstrate to the jury the points of similarity among the writings upon which he based his conclusion that all were the products of the same hand (Trial Tr. 41-51).

At the conclusion of the prosecution's case, government's exhibits 1-4 were received in evidence without objection; exhibit number 6 was received over objection; exhibit number 5 was never placed in evidence (Trial Tr. 54).

No evidence was presented by the defense.

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[3] The heading on the card "list other Arrests" and appellant's response "arrested for checks, California, Nevada, New York" was blacked out (1 Supp. Tr. 20). This was in accordance with the suggestion of this Court in *Leigh* v. *United States*, *supra*: "The objectionable words could easily have been blocked out or otherwise eliminated."

[4] As Miller explained to the jury: "Now, the photograph that you have in front of you shows portions of this card and not the entire card. I wanted to cut out some things that were not pertinent to the checks so you wouldn't have too much to look at to distract you." (Trial Tr. 43).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 1401 provides:

> Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years.

Title 28, United States Code, Section 1731 provides:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

Rule 30, Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Federal Rules of Criminal Procedure provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The pre-trial motion to suppress the handwriting specimen card, on the ground that it was obtained by police threats of violence, was properly denied. At the hearing on the motion, conflicting testimony was given by appellant and Detective Sergeant Kapsol, the only two witnesses, as to the circumstances surrounding the completion of the handwriting card. The District Court resolved the conflict in testimony adversely to appellant and found that he had voluntarily filled out the handwriting card. That finding, which is based on substantial evidence, should not be disturbed.

II

No improper use was made of the handwriting card at the trial. All reference to appellant's prior arrests was blocked out, and the only thing shown to the jury were photographic reproductions of portions of the card. All reference to the card was for the limited and legitimate purpose fo comparing it, as an admitted writing of appellant, with the handwriting on the alleged forged checks.

III

Appellant was not placed twice in jeopardy for the same offense. The record affirmatively shows that a mistrial was declared and the jury discharged in the first trial upon appellant's motion and with his consent. It is not now open to appellant to claim that retrial was barred by an act of discretion taken in his favor, at his instance, and solely out of a regard for his interest. Moreover, the conduct which appellant asserted as the basis for his mistrial motion never in fact took place.

Appellant did not raise the question of former jeopardy at his second trial. The constitutional privilege was therefore waived.

IV

Appellant's post-conviction motion to dismiss the three forgery counts in the indictment, on the grounds that proof

of venue was insufficient, was properly denied. Appellant did not in any manner indicate to the trial court that proof of venue was in dispute. His post-conviction motion to dismiss the forgery counts therefore came too late. Moreover, the government's proof of venue was sufficient. There is a presumption that a check was forged in the place where it was first found or uttered. Standing uncontradicted, the government's direct proof that the three checks were uttered in the District of Columbia was sufficient proof that they were forged in the District of Columbia.

ARGUMENT

I. The Pre-trial Motion To Suppress the Specimen Handwriting Cards Was Properly Denied.

Appellant moved to suppress the handwriting specimen cards given by him while in police custody on the grounds that they were filled out involuntarily under threats of physical violence, in violation of due process of law and the privilege against self-incrimination,[5] and that they contained prejudicial matter which could not be adequately erased without causing suspicion in the mind of the jury. He was accorded a hearing on that motion at which he testified that after "about an hour or so" at the Check and Fraud Squad, during which time he was not advised of his right to consult with counsel or his right not to fill out the cards, he was told by Detective Sergeant Kapsol: "We have enough handwriting specimens here on your papers and there are other ways and means to make you fill out the cards." Appellant testified that he understood their words to mean "that physical harm could be used or any other pressure could be put upon me" and that he was thereby influenced to complete the cards. Detective Sergeant Kapsol, the only other witness to appear at the hearing, testified that no threatening words were spoken and that appellant filled out the cards willingly after having been advised that he had a right not to do so and that he had a right to

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[5] Wigmore considers that the privilege against self-incrimination is inapplicable to the taking of handwriting specimens. 8 Wigmore, Evidence § 2265 (McNaughton, rev. 1961).

consult with counsel (1 Supp. Tr. 16-21). The District Court found that the cards had been filled out voluntarily and that, with the reference to prior arrests blacked out, they contained nothing prejudicial to appellant. The motion to suppress was therefore denied.

Appellant argues that the record of the testimony at the hearing on the motion to suppress did not provide a basis for a reasonable conclusion that appellant filled out the cards voluntarily (Br. 18). It is submitted that the testimony of Detective Sergeant Kapsol was fully sufficient to warrant such a conclusion. Moreover, findings by a trial court on conflicting evidence should not be disturbed on appeal except under the most extraordinary circumstances. *United States* v. *Johnson*, 327 U.S. 106, 111 (1946).

Appellant also contends that the handwriting cards should have been suppressed because they were obtained during a period of unnecessary delay between arrest and presentment to a committing magistrate. *Mallory* v. *United States*, 354 U.S. 449 (1957). Not only is the record wholly insufficient to support such a contention, but no *Mallory* objection was raised at any time during the proceedings below. The argument comes too late when advanced for the first time on appeal. *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 399, 308 F.2d 652 (1962); *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961); *Washington* v. *United States*, 103 U.S. App. D.C. 396, 258 F.2d 696 (1958); *Blackshear* v. *United States*, 102 U.S. App. D.C. 289, 252 F.2d 853 (1958).

II. The Use of the Handwriting Specimen Card at Trial Did Not Constitute Error.

The specimen handwriting card filled in by appellant was marked for identification during the trial but was never received in evidence or shown to the jury. Photographic reproduction of portions of the card appeared in the upper section of Government exhibit No. 6, the special exhibit prepared by the handwriting expert Miller. Appellant contends that Miller's references to the facts that appellant had executed a sample check on the original card, and that

the original card contained information "not pertinent to the checks," constituted plain error requiring reversal.

It having been found by the District Court that the card had been executed voluntarily by appellant, the use of the card as an admitted writing with which to compare the handwriting on the alleged forged checks was proper. *Bryant* v. *United States*, 244 F.2d 411 (5th Cir. 1957). Similarly proper was the use of a composite photograph of handwriting samples for purposes of comparison. *Hartzell* v. *United States*, 72 F.2d 569 (8th Cir. 1934). Every word which could be considered objectionable had been blacked out on the original card, and the fact that the jury became aware that the card contained information which they did not see has no effect on the admissibility of the card, or a photographic reproduction thereof, as an admitted handwriting for purposes of comparison. *Hardy* v. *United States*, 199 F.2d 704 (8th Cir. 1952). All reference to prior arrests having been deleted, no legally protected right of appellant was infringed by the use of the card for such purpose. Certainly the record does not disclose anything which could be interpreted as a suggestion that the prosecution possessed additional incriminating evidence which was being withheld. The original card could have been shown to the jury and received in evidence without valid objection. Appellant cannot therefore complain that he was prejudiced by references to that card.

III. The Trial Court Did Not Err in Denying Appellant's Post-Conviction Motion To Dismiss the Three Forgery Counts in the Indictment.

Appellant contends that, as to the three forgery counts in the indictment, the Government's proof of venue was insufficient and that his post-conviction motion to dismiss those counts should therefore have been granted. The contention is without merit. Even if the trial court's attention had been properly directed to the matter of venue, there would have been no basis for a ruling that the Government's proof of venue was not sufficient.

The Government's evidence showed that three forged checks, all drawn on a District of Columbia bank, were

uttered by appellant at various places of business in the District of Columbia. The evidence showed that appellant committed the forgeries but did not show directly that he committed them in the District of Columbia. No motion for judgment of acquittal was made by appellant at the close of the Government's case, and no instruction on proof of venue was requested by him. Nor did appellant take any exception to the instructions given or request any additional instructions.[6] Had appellant indicated in any way that proof of venue was contested, the trial court would have had an opportunity to rule on the sufficiency of the proof and supplement its instructions. His failure to so indicate precluded appellant from raising the point for the first time after conviction. *United States* v. *Stallsworth*, 193 F.2d 870 (7th Cir. 1951); *Smith* v. *United States*, 61 App. D.C. 344, 62 F.2d 1061 (1932); *Fleitas* v. *United States*, 40 F.2d 636 (5th Cir. 1930); *Ryan* v. *United States*, 285 Fed. 734 (5th Cir. 1922).

In any case the Government's proof of venue as to the forgery counts was sufficient. Venue may be proved by circumstances and inferences. *White* v. *United States*, 83 U.S. App. D.C. 174, 167 F.2d 747 (1948); *Read* v. *United States*, 55 App. D.C. 43, 299 Fed. 918 (1924), and in forgery cases there is a presumption, or at least an inference, that an instrument was forged in the place where it was found or uttered. *Conley* v. *United States*, 23 F.2d 226 (4th Cir. 1928); *United States* v. *Britton*, 24 Fed. Cas. 1239 (No. 14650) (C.C.D. Mass. 1822).[7] This inference or presumption, standing unchallenged by any other evidence in the

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[6] The trial court did not instruct the jury that it must find the forgeries were committed in the District of Columbia.

[7] In the Britton case, Judge Story stated the rule as follows:

"Acts of this sort (forgeries) are not usually done in the presence of witnesses; but in places of concealment, with a view to prevent detection; and it is rare that the Government can offer any evidence on the place of the forgery, except that which arises from the utterance of the forged. And I take the rule of law to be, that the place where an instrument is found or offered in a forged state, affords prima facie evidence, or a presumption, that the instrument was forged there, unless that presumption be repelled by some other fact in the case.

. . . The rule which I have stated, is not merely correct in a legal sense, but it is the dictate of common sense and reason. If a forged instrument is found or uttered in one place, and there is no evidence to show that it

case, provides sufficient proof of venue. *Cf. George* v. *United States*, 75 U.S. App. D.C. 197, 201, 125 F.2d 559, 563 (1942), and cases collected at 164 A.L.R. 649, 650. Applying these principles to the present case, the Government provided sufficient proof that the checks were forged in the District of Columbia when it proved that they were found and uttered in the District of Columbia.

Since appellant was given concurrent sentences on each count of the indictment, it is not necessary for this Court to consider questions raised with respect to the three forgery counts if it finds that the conviction as to the three uttering counts must be sustained. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). The Government's proof of venue as to the three uttering counts was direct and uncontradicted. The jury could not reasonably have concluded that these offenses did not take place in the District of Columbia, and the convictions must therefore be sustained.

IV. Appellant's Privilege To Be Free From Double Jeopardy Was Not Violated.

Appellant contends that the trial which resulted in the judgment of conviction here appealed from violated his constitutional privilege not to be twice placed in jeopardy for the same offense. The claim is frivolous. Not only did appellant himself procure and thereby consent to the discharge of the jury in the first trial but he failed to raise the question of former jeopardy at the second trial. The claim arises on the following facts.

On February 7, 1963, a jury was impaneled and sworn to consider the charges against appellant contained in the eight count indictment filed October 3, 1960. Following

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was forged elsewhere, what ground is there to presume, that it was not forged, where it was found or uttered? If its existance in a forged state is not proved in any other place, it must, from the necessity of the case, be presumed to have been forged where its existence in such state is just made know. And there is no hardship in such a presumption, for the prisoner, if he thinks the fact in his favor, can show where it was forged, for he has cognizance of the time and place, or at least can show, what was its state when it first came into his possession. If the law were otherwise, it would be almost impossible to convict any person of a forgery, for such acts are done in retirement and concealment, far from the sight of all persons but confederates in guilt." (24 Fed. Cas. at 1241).

opening statements by counsel in which no mention was made of the number of counts in the indictment or of the specific transactions which gave rise to those counts, the court recessed. When it reconvened on February 8, 1963, the prosecutor informed the court that a witness necessary to prove counts three and four of the indictment would be unavailable, and he therefore moved to dismiss those counts. Appellant countered with a motion to declare a mistrial on the ground that the prosecutor's earlier reference to the number of counts in the indictment (no such reference had in fact been made) had prejudiced the jury. The trial judge, who was also under the impression that the counts of the indictment had been referred to by number, granted appellant's motion to declare a mistrial. At the same time he granted the prosecutor's motion to dismiss counts three and four of the indictment (11 Supp. Tr. 17-18). A second jury was impaneled and sworn on February 11, 1963, and found appellant guilty of the six counts which remained in the indictment. A plea of former jeopardy was never presented to the trial court.

It is settled that a defendant cannot plead former jeopardy when the jury before which he was first on trial was discharged on his own motion or with his consent. *Crawford* v. *United States*, 109 U.S. App. D.C. 219, 285 F.2d 661 (1960); *United States* v. *Gori*, 282 F.2d 43 (2d Cir. 1960); *Blair* v. *White*, 24 F.2d 323 (8th Cir. 1928); *Barrett* v. *Bigger*, 57 App. D.C. 81, 17 F.2d 669 (1927), *cert. denied* 274 U.S. 752. The record in the instant case is clear and unambiguous. Appellant moved for a mistrial, and implicit in such a motion is consent to the discharge of the jury. That the trial court so understood the motion plainly appears from the language of the judge: "The motion having been made by defense counsel and with the concurrence of the defendant, and I declare a mistrial in this case." It is not now open to appellant to claim that all retrial was barred by an act of discretion taken in his favor, at his instance, and out of a scrupulous regard for his interests. *Gori* v. *United States*, 367 U.S. 364 (1961). The claim is entitled to even less weight than it would be otherwise in

view of the fact that the conduct which allegedly prejudiced appellant never took place.

Downum v. *United States*, 372 U.S. 734 (1963), heavily relied on by appellant, is factually the opposite of this case. There the prosecutor, having failed to assure the presence of a witness essential to two of the six counts in the indictment, opposed the defendant's motion to dismiss those counts and to continue the trial on the remaining four. A mistrial was declared over the defendant's objection, and the Supreme Court held that the defendant was immune from retrial. Such a holding, of course, has no relevance to a case in which the record reveals a mistrial declared upon the defendant's motion and with his consent.

Even if the circumstances did lend any substance to appellant's claim that he was twice placed in jeopardy for the same offense, the question could not be raised for the first time on appeal. The constitutional privilege against double jeopardy must be asserted at the trial proceedings or it is waived. *United States* v. *Hoyland*, 264 F.2d 346 (7th Cir. 1959); *Morlan* v. *United States*, 230 F.2d 30 (10th Cir. 1956); *Graham* v. *Souier*, 53 F.Supp. 881 (W.D. Wash. 1944), *affirmed* 145 F.2d 348 (9th Cir. 1944), *cert. denied* 324 U.S. 845; *Levin* v. *United States*, 5 F.2d 598 (9th Cir. 1925). The record fails to indicate that appellant presented the question of double jeopardy to the trial court in any manner and therefore it was waived.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD E. LEIGH,

Appellant

v.

UNITED STATES

Case No. 18025

PETITION FOR REHEARING EN BANC

Petitioner, by his court-appointed counsel, prays this full Court to rehear his appeal en banc, to set aside the panel decision of this Court decided January 30, 1964, which affirmed the judgment of conviction appealed from, and for such other relief as is just and proper in the premises. In support of his petition, the Petitioner sets forth as follows:

Preliminary Statement

Petitioner prays that the full Court rehear his appeal en banc pursuant to Rule 26 of this Court so that highly important issues raised in his briefs, including those which have divided this Court in prior opinions, may be resolved by the full membership of this Court.

It is particularly appropriate that rehearing en banc be granted in this case since the positions of the three Judges constituting the panel which rendered the decision of January 30th are, we most respectfully submit, ambiguous. Court-appointed counsel briefed five major issues in his briefs in this Court which he deems substantial, and worthy of this Court's considered attention. The two-Judge majority opinion, however, discusses only one issue -- the double-jeopardy issue -- and dismisses the rest of Petitioner's arguments with the phrase, "We have examined the other errors

assigned by appellant and find them without merit". We can only interpret this categorical rejection to mean that two of the three-Judge panel have found that none of the other four issues, assiduously briefed and argued by Court-appointed counsel, are substantial enough even to merit discussion. We respectfully submit our disagreement with this position, and suggest that it denies appellant his right to a reasoned decision on important constitutional issues and other issues of the first magnitude of importance in criminal law. We further submit that these arguments merit the studied attention of the full Court on rehearing.

Further, we suggest that although all three Judges concurred in the result, there is a patent inconsistency between the per curiam decision of two Judges and the concurring opinion of Judge Wright. The per curiam decision found all other issues, including by implication the "Mallory issue", to be "without merit" after "examination". Judge Wright, who concurred only in the result reached by the two-Judge opinion, found, after reviewing the same evidence adduced on the motion to suppress, that this case involves:

> "...the typical situation which the Supreme Court, in its McNabb-Mallory line of cases, sought to eliminate",

and

> "Here we have an obvious Mallory violation".

Despite the obviousness of the violations, however (and this finding should clearly demand reversal as "plain error" within the meaning of Rule 52, F.R. Crim. P.), Judge Wright joined in the result reached by the other two members of this Court on the basis that the failure of Petitioner's court-appointed counsel to cite the Mallory decision [1/] during the evidentiary hearing on Petitioner's pre-trial motion to suppress, constituted a waiver

1/ Mallory v. United States, 354 U.S. 449.

of the suppression principle reiterated in that decision. In short, we read the per curiam decision to mean that under the evidence adduced below, no substantial issue involving the illegality of the evidence was found; and we read Judge Wright's opinion as meaning that while the record shows that the evidence upon which Petitioner's conviction was based was typically and obviously illegal under the "Mallory" case, court-appointed counsel's failure to cite that case resulted in a waiver of its application to the evidence presented.

The difficulty in the per curiam decision is that it has disposed of an assignment of error based on what a third Judge of this Court has described as an "obvious Mallory violation", without articulating any rationale for its action. The application of the Mallory case in specific factual settings has produced sharp divisions of this Court which in several recent instances have placed the authors of the instant per curiam opinion among the dissenters. E.g., Killough v. United States, 114 U.S. App. D.C. 305, 315 F.2d 241 (1962); Coleman v. United States, 114 U.S. App. D.C. ___, 313 F.2d 576 (1962). It would constitute manifest injustice if Petitioner's position before this Court were finally determined by the happenstance of panel selection. This might result if en banc review of this appeal, involving as it does a novel situation under the Mallory rule, is not given the same searching review by this Court that has been accorded other appellants in every other case where the issue has ever been presented.

Aside from the "Mallory" issue, moreover, there is the issue of the "voluntariness" of the incriminating evidence which was met neither in the per curiam opinion nor in Judge Wright's concurrence in the result.[2/]

2/ We discuss this point more fully, infra.

There are also three other issues of primary importance which, based on our serious research into the decisional law, we believe deserve more than a summary out-of-hand dismissal.

Argument

I.

As Judge Wright observes, the documentary evidence used to procure Petitioner's conviction was obtained illegally through an obvious violation of the Federal rule of exclusion most recently enunciated in the Mallory case. It is Petitioner's position that such documentary evidence consisting of incriminating questionnaires which Petitioner was coerced into executing, and a handwritten counterpart of the very checks he was accused of forging, were extracted from Petitioner by a police officer through a process of secret interrogation coupled with coercion and intimidation and in violation of his rights under the Fourth, Fifth, and Sixth Amendments, which independently warranted the grant of Petitioner's pretrial motion (later renewed after trial) to suppress the illegal evidence on the basis of the facts set forth in Petitioner's moving papers, and the transcript of the evidentiary hearing on the motion.

The facts are fully developed in our briefs, including Petitioner's arrest by Virginia police, his removal to the District of Columbia by two D. C. police officers who took him to a squad room for interrogation; an additional hour or more of secret grilling in a squad room during which Petitioner's police interrogator reminded Petitioner that he was a deportable alien and that the police interrogator would have to notify an embassy of his arrest; followed by Petitioner's capitulation some 5-1/2 hours after his arrest, and the evening before his preliminary hearing the

following day in Municipal Court, when he executed in his own hand, all of the incriminatory evidence upon which his eventual indictment was based, and which was used to procure his conviction. In this instance the "brain-washing" technique used had no conceivable purpose other than to break down Petitioner's will. A complaint had been outstanding against Petitioner for at least five months, and he was clearly and admittedly identified on removal from the State of Virginia without hearing. The testimony of his secret interrogator that he had advised Petitioner (an alien) of his constitutional rights while en route in a squad car, and this policeman's bald conclusion that Petitioner's act of self-incrimination after 5-1/2 hours of detention was "voluntary", are not only prima facie incredible, but are rebutted by the witness's own testimonial accusation that Petitioner was an East German Communist sympathizer with a criminal record (apparently to add the Sacco-Vanzetti atmosphere). It seems apparent that there is a reasonable presumption that this crucial evidence was coerced either through implied threat or through improper inducement from an alien in the sole control of a police interrogator who was playing a secret game of "cat-and-mouse" in a police squad room with a highly vulnerable accused without benefit of legal counsel.

It is our position that Petitioner's pretrial motion to suppress the written dossier which Petitioner was forced to prepare against himself, including "tableaux vivants" of the crimes of which he was accused, when considered with the evidence adduced by both parties on the hearing on the motion, involved any legal theory of suppression available under the facts presented. Court-appointed counsel below no more waived the legal theory of the Mallory decision by failing to cite that case, than an attorney in any

trial who fails to cite a case which a reviewing court may consider most apposite under the facts.[3/] In this connection it is to be noted that Rule 41(e) of the Federal Rules of Criminal Procedure specifically provides that a pretrial motion to suppress is available to "A person aggrieved by an unlawful search and seizure", a circumstance present in the case at bar. See: Bynum v. United States, 104 App. D.C. 368, 262 F.2d 465. While Rule 12 also provides for the pretrial determination of defenses and objections which could, before the promulgation of the rule, have been determined on "pleas, and demurrers and motions to quash", this rule did not contemplate the kind of pretrial evidentiary hearing here involved relating to the legality of the evidence to be adduced on the trial. See: Rule 12(b)(4). In short, a motion to suppress before trial which is heard on evidence, is founded on Rule 41(e), and any valid theory of suppression is available in ruling on the merits of such motion, including the suppression principle of the Mallory case.

Aside from that suppression principle which is invoked on the basis of a presumption that evidence obtained in violation of Rule 5 is involuntary (and there is here a manifest violation of Rule 5), the evidence could and should have been suppressed as "involuntary" in the broad legal sense in which that term is used. While Judge Wright refers to the fact that the "voluntariness" of the evidence rested on the secret police interrogator's

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3/ In this respect, we must take exception to the suggestion of Judge Wright that counsel appointed by this Court might have maintained that Petitioner was inadequately represented on the trial by former court-appointed counsel because he did not cite the Mallory case during the extensive evidentiary hearing. Counsel submits that counsel below performed a highly competent task of briefing applicable cases, and presenting all of the evidence in a motion to suppress, and that the error was that of the court in failing to apply the applicable rule of suppression in the face of "obvious" illegality in the evidence of record. Present counsel does not feel that it is part of his duties to make such criticism of a counsel who has labored long in the vineyard, pro bono publico, particularly on the basis of an incomplete record.

oath against Petitioner's, that is not an accurate analysis of the record. The point of testimonial conflict on the hearing on motion to suppress was whether the police officer had made statements to Petitioner as an inducement to him to incriminate himself, to the effect that "there are other ways of making you fill them out", which Petitioner could have interpreted as a threat of actual physical harm. Let us assume, arguendo, that the police officer's testimony should be credited on this issue. It is the constitutional duty of the court not only to consider actual threats, but also whether the statement was "made freely, voluntarily and without compulsion or inducement of any sort", and such determination is possible "only by an examination of all of the attendant circumstances" by the reviewing Court. Pate v. Page, 325 F.2d 567, 569 (C.A. 10, 1963, per Judge Pickett). Even on review of state cases arising under the 14th Amendment, the Supreme Court has held in Spano v. New York, 360 U.S. 315, 316, "we cannot escape the responsibility of making our own examination of the record", and more recently in Haynes v. Washington, 373 U.S. 503, that incommunicado detention coupled with "psychological duress" are sufficient to render incriminating statements inadmissible. The Federal Rule in respect to the "voluntariness" test is far stricter, and not only assumes that "Intimidation and duress are necessarily implicit in" this kind of situation, but places on the Government, where the foundation is laid, "the burden of convincing the court that /intimidation and duress/ are in fact absent". Judd v. United States, 89 App. D.C. 64, 190 F.2d 649, 651. In fact, in Judd, apropos the instant facts, this Court said that circumstances may make "any claim of actual consent 'not in accordance with human experience', and explainable only on the basis of 'physical or moral compulsion' ".

Under the circumstances of this case other constitutional principles

supporting the motion for exclusion are also applicable. Since tangible evidence was illegally forced from Petitioner, an unreasonable search and seizure violative of his Fourth Amendment rights is involved (Bynum v. United States, 104 App. D.C. 368, 262 F.2d 465), as well as a violation of his rights to due process of law under the Fifth Amendment (see cases cited in briefs), and a violation of his right to be advised and assisted by counsel at every meaningful stage of the criminal proceeding guaranteed to him by the Sixth Amendment. Lee v. United States, 322 F.2d 770 (C.A. 5, 1963).

The considerations involved in reaching a valid opinion on the issues here involved require, as the Supreme Court said in Haynes v. Washington, 373 U.S. 503, 515-516, "an independent determination" by the reviewing court. Here we are faced with the conclusion of a District Court Judge, who, in all due respect, did not explain his ruling on the motion to suppress, a majority opinion of two Judges of this Court who similarly have not pointed out the path through this controversial thicket by which they reached their result, and a concurring opinion which has found clear cut illegality in the procurement of the evidence (and incidentally "plain error" on the face of the record within the meaning of Rule 52(b)), but whose holding would rest on the failure of an uncompensated court-appointed counsel (one of the many who have appeared on this record) to utter the proper legal formula for a fair resolution of the evidence presented to a judge to whom such legal theory is an everyday banality.

II.

The issue of the admissibility of the evidence (assuming arguendo its legality) is also a subject which should be resolved by a reasoned evaluation of this full Court since it has never been the subject of a case in

point. Contrary to the Government's brief, the issue is not whether a "handwriting sample" obtained from an accused for that purpose only is admissible on his trial for forgery. The issue here is whether, under the colorable pretext that an exhibit is being introduced for that purpose, the accused is prejudiced by:

(a) The admission of an enlarged photographic reproduction of a check which, as explained to the jury, was executed by the accused while in police detention, which in word text and form was a counterpart of the checks he was accused of forging, and which was reproduced side-by-side with photographic reproductions of the allegedly forged checks, to create the obvious impression that the accused had forged a copy of the alleged forgeries. This is the equivalent of showing to the jury "tableaux vivants" of a crime to impress upon them in stark pictorial form the Government's version of its commission. This is the only possible explanation of the Government's position after this Court's prior reversal of this case under a related issue, and in view of the fact that the Government was in possession of numerous "handwriting samples" had it needed a document in Petitioner's handwriting for the purpose of handwriting analysis alone.

(b) The offer of the original questionnaire before the jury for identification alone, and without showing the jury the original document, allowing the Government witnesses to make extensive references to the way the document was obtained from Petitioner, his execution of the counterpart check thereon and to make references to other incriminating information supplied by Petitioner in the questionnaire which identified Petitioner with the information on the checks, as well as other facts which also were used in making the handwriting analysis.

This issue is a very substantial one since the entire body of evidence supporting the judgment of conviction was offered to the jury as coming from Petitioner's own hand. This was as prejudicial to Petitioner as though he had been made to wear a badge marked "forger".

III.

As shown in our briefs, Counts 1, 3 and 5 (the forgery counts) should have been dismissed for failure of the Government to prove or the Court to instruct the jury as to the essential jurisdictional fact pleaded in the indictment and otherwise requisite to the territorial and subject-matter jurisdiction of this Court under 22 D. C. Code 1401, i.e., that such crime must be found to have been committed in the District of Columbia. This Court has held that substantive territorial jurisdiction (as opposed to venue of Federal crimes) is a requisite element of proof of local crimes under the D. C. Code which must be proved beyond a reasonable doubt. Davis v. United States, 18 App. D. C. 468, 495-496 (1901); Brown v. United States, 35 App. D. C. 548; Nelson v. United States, 97 App. D. C. 6, 227 F.2d 21, 24; Simms v. United States, 101 App. D. C. 304, 248 F.2d 626, 628, certiorari denied Duncan v. United States, 355 U.S. 875. In opposition to our position the Government argued that in the absence of any proof (and the evidence here was consistent with the theory that if any forgery was committed it was in Virginia) it could be presumed that the alleged forgeries were committed in the District of Columbia. First, the jury was not instructed as to such presumption and under the instructions were free to reach their verdict without regard to the locus delicti. Secondly, such a presumption is totally without logical support. The Supreme Court of the United States has recognized the problem of employing a presumption drawn

from a premise which is wholly uncertain and presently has sub judice an analogous problem in United States v. Barrett, No. 606, this Term (322 F.2d 292, C.A. 5, 1963). We respectfully suggest this issue deserves the full attention of this Court also.

If these three forgery counts have not been proved by substantial evidence, the three interrelated uttering counts would also fall, since the jury were told that in respect to each count of uttering, they must find that the same check was forged in the same transaction as otherwise charged in a comparison forgery count -- forgery being an element of the crime of uttering. In this situation the principle that a reviewing court will not consider errors in some counts which do not affect other counts independently supporting the sentence, is inapplicable. In respect to one count charging the forgery of a described check, and another count charging the uttering of that described check knowing it to be forged as charged, the reversal of the forgery count would, a fortiori, require the reversal of the uttering count. It was recognized in United States v. Maybury, 274 F.2d 899 (C.A. 2, 1960) that in a prosecution for forging a payee's name on a Government check, and for uttering the same check knowing the check to have been thus forged, an acquittal under the forgery count was inconsistent with a conviction for uttering the same described check knowing it to have been forged as part of the same transaction. Here, the Government's failure to prove the 3 forgery counts also deprives the 3 companion uttering counts of an essential element of proof under the particular facts of this case, especially in view of the extremely vague charge to the jury. Surely this is an important and novel issue worthy of some serious consideration by this Court!

IV.

The decision dismisses the double jeopardy issue presented on this appeal by the catechistic application of a broad rule that any defendant whose legal attack or whose acquiescense in a legal attack on the continuance of a trial predicated on a violation of his constitutional rights to a fair trial by jury, must be deemed to have waived another constitutional right not again to be tried for the same alleged crimes. The implication of this construction is that a defendant whose fair trial by jury has been made impossible through the prosecutor's own misconduct, cannot even seal his lips, but must actively insist that the unfair trial proceed to verdict and that it not be terminated through the declaration of a mistrial, before he can insist on his constitutional rights not to be retried a second time after a mistrial.

However legally ossified this general theory may have become in a consitutional area which has generated more misconstructions than valid constructions, it surely has been at least extremely narrowed by the Supreme Court's 1963 opinions in Downum v. United States, 372 U.S. 734; Fong Foo v. United States, 369 U.S. 141, 143; Gori v. United States, 367 U. S. 364, and in the earlier opinion in Green v. United States, 355 U. S. 184, which overruled this Court's general theory that the defendant is deemed impliedly to have waived his rights against retrial by a successful attack on the legality of his trial. Downum, Fong Foo, and Gori, when read together, stand for the proposition that where the only reason for the termination of a trial is the misconduct or unpreparedness of the prosecutor, a mistrial closes the door to subsequent prosecution regardless of the technicality of who raises the legal objection to its continuance. In this respect it is to be noted that in Downum, the Supreme Court accepted under a conflict of circuit court

opinions, the holding of Cornero v. United States, 48 F. 2d 69 (C. A. 9, 1931), in which it was defendant's counsel who initially raised the legal objection to the "continuance" of the trial when the prosecutor was not prepared to put his witnesses on the stand. Fong Foo, like the instant case, involved a situation where the trial was terminated on the basis of prejudicial misconduct of the prosecutor, over the prosecutor's objection. And the Supreme Court presently has under review (on the Government's appeal) the question of whether, where a defendant changes his plea to guilty before jury verdict, and then successfully sets aside his conviction on appeal, he has impliedly given consent to a new trial. United States v. Rocco Tateo, No. 328, this Term. The District Court in that case (216 F. Supp. 850 (S. D. N. Y., 1963)), following the Supreme Court's Green decision, rejected the notion of constructive waiver even where the defendant precluded a jury verdict by changing his plea. The Solicitor General is again urging the theory of constructive waiver.

In view of these recent reinterpretations of the Supreme Court's construction of the double jeopardy provision, we submit that the circumstances of the instant case deserve a new look by this full Court. The doctrinaire constructions of past opinions in many instances have either been placed in doubt or implicitly reversed, and solutions to such fact situations as here involved cannot be resolved merely by culling through a vineyard of obsolete decisions. This Appellant has in fact been "harassed" by three trials, for alleged crimes involving $145, for which he has been jailed for 3-1/4 years, which would not count toward his ultimate sentence. We respectfully pray this Court to reconsider en banc this important constitutional issue on its facts, and against the background of new concepts of its meaning and proper application.

V.

Finally, Petitioner has raised the issue on this appeal that any future execution of his sentence of up to five years would now constitute a cruel and unusual punishment in relation to the crimes charged, and would deny Petitioner, a pauper, equal protection of the laws in that he would be incarcerated for perhaps twice the time to which any other defendant similarly situated (but able to pay a bondsman or raise bail) would serve. Appellant is an alien whose alleged crimes involved the total sum of $145, for which he has paid dearly with 3-1/4 years of his life, occasioned by the errors of the Government. He now lives in the shadow of serving a full sentence of up to 5 years.

While this point was not raised initially, the months which have transpired since he originally noted his appeal have compounded the cruelty and inequality of Petitioner's sentence. This was explained during extensive argument of many hours before a different panel of this Court on Petitioner's motion seeking release from illegal detention from the D. C. Jail in disobedience to this Court's own order, and which also asked for his release on the same basis set forth herein.[4/] While this issue does not appear of record, this Court was fully advised that Petitioner was illegally restrained for a month and a half (from October 11, 1963 - November 27, 1963) in defiance of this Court's own order that he be released forthwith on his own recognizance, and the Court made a full investigation of the documents in the D. C. Court of General Sessions upon which the U. S. Attorney was

4/ This Court has not acted on this motion which has been pending since it was argued November 27, 1963.

attempting to justify his defiance of this Court's order.[5/] In addition to the threatened double punishment imposed on Petitioner and his illegal restraint for the period described above, there are many other aspects of this proceeding also described to a different panel of this Court which at the very least, merit a full hearing on these issues. Among these .is the fact that Petitioner's two-way exchange of mail with his court-appointed counsel has been continuously censored,as present counsel pointed out and demonstrated to the three Judges during the several hours of argument on the motion. Petitioner has proof that his attorney-client mail has been censored from the beginning of his incarceration by the censor's stamp affixed to all such mail. These and other facts establishing such denial of Petitioner's constitutional rights should be the subject of further hearing if this Court does not find the direction of an acquittal necessary.

WHEREFORE, the premises considered, it is respectfully prayed that Petitioner be granted a hearing before this full Court en banc, and such other relief as in the premises may be fair and proper.

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300 American Building
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February 24, 1964

5/ Belatedly recognizing his error, the U. S. Attorney had Petitioner released the evening of this argument.

Certificate of Good Faith

Court-appointed counsel certifies that the foregoing petition is presented in good faith and not for delay.

Maurice M. Jansky
Court-appointed Counsel for
Richard E. Leigh, Petitioner

Certificate of Service

I hereby certify that a copy of the foregoing petition was served on the United States by mailing said copy on February 24, 1964, postage prepaid, to David C. Acheson, Esq., U. S. Attorney for the District of Columbia, United States Court House, Washington, D. C.

Maurice M. Jansky
Court-appointed Counsel for
Richard E. Leigh, Petitioner

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18025

RICHARD E. LEIGH,

Appellant

v.

UNITED STATES

APPEAL FROM JUDGMENT OF CONVICTION
OF FORGERY AND UTTERING IN VIOLATION
OF SECTION 22-1401, D. C. CODE

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Counsel for Appellant
Appointed by this Court

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REPLY BRIEF FOR APPELLANT

In reply to the Government's Brief filed herein, Appellant states as follows:

I.

The Motion to Suppress Documentary Evidence Which Appellant Was Forced to Execute During a Period of Police Detention at a Time When He Had Not Been Advised of His Constitutional Rights, Should Have been Granted.

As shown in Appellant's Brief, Appellant moved prior to trial to suppress certain "handwriting sample" cards (in reality, questionnaires) on the basis that he had been forced to execute these in a squad room of the D. C. Police Department under the duress of what he, as a deportable alien, believed to be threats of physical violence by a District of Columbia police sergeant, some 5-1/2 hours after his arrest and after an hour or so of secret grilling in the police squad room, and prior to the time, the following day, when for the first time he was given a preliminary hearing in the then Municipal Court and for the first time advised of his right to counsel and his other constitutional rights, including his privilege against self-incrimination. The Government's Brief takes the position that the District Court's denial of this motion, which was based on the unanalized conclusion that Appellant's act of self-incrimination was "voluntary", should be accepted by this Court (1) on the basis of the testimonial conclusion of the secret interrogator, Detective Sergeant Kapsol, that the incriminating documents were "voluntarily" executed, and (2) on the principle that on

appellate review, this Court should not disturb a lower court finding based on conflicting evidence.[1/] As we have explained in our Brief, the relevant facts necessary to develop an informed conclusion as to whether Appellant was coerced into executing the incriminating documents by a process intended to break down Appellant's will (and in the circumstances of this case the secret police interrogation could have had no other purpose) cannot rationally be resolved on the basis of the ipse dixit of a police sergeant that Appellant's act was "voluntary". And yet, the District Court's disposition of the motion was predicated on that basis alone. This finding does not meet the test of sufficiency in any respect. This Court has held that where a motion to suppress is based on allegations that incriminating evidence has been obtained from an accused while in arrest, the burden on the Government seeking to prove that there was no "duress or coercion, actual or implied" is "particularly heavy". Judd v. United States, 89 App. D. C. 64, 190 F.2d 649, 651. In the Judd case, this Court recognized that (190 F.2d at p. 651), "Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent". Apropos of the circumstances of the instant case, as explained in our Brief, this Court recognized that (Ibid):

> "In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human

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1/ The Government's attempt to support the Court's further finding that with the reference to prior arrests blacked out, the so-called "handwriting sample" cards (i.e., questionnaires) "contained nothing prejudical to appellant", is fully answered in Appellant's Brief (Statement of the Case, pp. 4-5, 7-8, Argument, pp. 22-24), and in Paragraph II, infra.

> experience', and explainable only on the basis of 'physical or moral compulsion' ".

While the Government here urges application of a principle that it is not open to an appellate court to review conflicting evidence before a trial court, this principle is wholly inapplicable where incriminating evidence is procured from an accused while in police detention. The Supreme Court in its decisions in Haynes, Spano, and Leyra (cited at p. 20 of our Brief) has firmly established the contrary principle that such evidence obtained by police procedures which, as in the instant case, were pursued for the purpose of extracting a statement, must be reviewed "with the most careful scrutiny", indulging every presumption against the waiver by the accused of his constitutional rights during secret police interrogation. See e.g., Spano v. New York, 360 U.S. 315, 324.

The allegations of Appellant's motion to suppress, his attached affidavit in support thereof, and his testimony on the suppression hearing, all firmly established a patent violation of Rule 5(b), F.R. Crim. P., as the facts set forth in our Brief establish (pp. 2-5, 15-22. Every fact sufficient to invoke this Federal rule of exclusion was presented to the judge hearing the suppression motion, including the factors of "unnecessary delay" in taking the accused before a committing magistrate, failure to advise the accused of his right to counsel and of his privilege of silence, and the typical pattern of secret squad room police interrogation many hours after arrest. Then, after the incriminating evidence had been obtained during the evening hours, a preliminary hearing followed the next day. Since as we have explained a complaint had been lodged against the Appellant many months before arrest and he had been clearly identified,

this questioning in this instance could only have been for the purpose of extracting damaging admissions. The Government's summary and unexplained contentions that the record does not support invocation of the rule, and that "no Mallory objection was raised at any time during the proceedings below"[2/] are untenable. All the relevant facts sufficient to invoke the rule of exclusion were before the motions' judge who, without making any basic findings in support of his conclusion, overruled the motion on the basis of the facts presented. The fact that court-appointed counsel did not cite the Mallory case does not make that rule inapplicable to those facts, nor does it justify the Court's ruling on the motion to suppress on the facts presented.

Regardless, therefore, of the presence or absence of actual threats,[3/] these incriminating documents which Appellant executed after a period of illegal detention should have been excluded, not only because

2/ The so-called "Mallory rule" did not, of course, originate with that case. (Mallory v. U. S., 354 U.S. 449). It was merely an extension of McNabb v. U. S., 318 U.S. 332, and Upshaw v. U. S., 335 U.S. 410, which relaxed the difficult burden imposed on the secretly interrogated accused of proving actual coercion, by raising that fact to the status of a presumption in circumstances where police officers obtain damaging admissions after a period of illegal detention contrary to Federal procedures requiring prompt arraignment before a committing magistrate competent to advise the accused of his right to counsel and his other constitutional rights. The application of this rule in federal prosecutions has relieved the courts from having to reach, on motions to suppress, "the constitutional question" of ascertaining when a damaging statement "comes of a free choice and when it is extorted by force, however subtly applied". United States v. Mitchell, 322 U. S. 65, 68.

3/ Even in respect to state cases, it is not necessary to establish the fact that the accused was threatened with bodily harm to establish that an incriminating statement was obtained by unconstitutional means. Incommunicado detention coupled with psychological duress are sufficient. Haynes v. Washington, 373 U.S. 503.

they were the product of police illegality (see: Mitchell v. U. S., _____App. D. C. _____, 316 F. 2d 354 (1963)) but because their procurement was violative of Appellant's Fourth Amendment guarantee against unreasonable searches and seizures (Bynum v. United States, 104 App. D. C. 368, 262 F. 2d 465 (1958), as well as his other constitutional rights (see cases cited in Brief, p. 19).[4/]

II.

The Use of the Original Handwriting Sample Cards on the Trial Constituted Substantial and Prejudicial Error.

The second issue raised in Appellant's Brief need not be reached if Appellant prevails under the first issue (i.e., if it is found that the motion to suppress was invalidly overruled).

The Government's discussion of this point in its Brief of course assumes the legality of the evidence. Accepting arguendo this premise, it is clear that the Appellant was prejudiced by the use made of the so-called "handwriting cards". While the Government treats this issue (and cites cases in support of its contention) as to whether a handwriting sample executed by a defendant can be used for purposes of comparison, that is not the issue here involved.

First, this was not a mere handwriting sample, but an incriminating questionnaire. Had this document been shown to the jury,

4/ The Court of Appeals for the Fifth Circuit in Lee v. United States, 322 F. 2d 770 (C. A. 5, 1963) has recently held that the secret jailroom interrogation of an indigent accused, not represented by counsel, and not in connection with any unsolved crime, after his indictment, is a violation of due process of law and a basis for exclusion of an incriminating statement thereby obtained.

the deletion of the items relating to Appellant's prior arrests would not have cured its prejudicial effect. The card also contained other highly prejudicial information as, for example, information as to Appellant's previous employer "Belle Haven Country Club", a name which appears on the allegedly forged checks; the name of Appellant's bank, "American Trust", similar to the bank on which the checks were allegedly drawn, "American Security & Trust Company", and the same bank appearing on the sample check on the same card. Other information such as Appellant's birthplace and a listing of all of his occupations were also included. Had this document been shown to the jury, it would have been highly prejudicial because of the incriminating factual data therein. As shown in our Brief, some of this data was, in any event, disclosed to the jury by Government witnesses.

Secondly, the original copy of this "handwriting sample" card was not shown to the jury, although as explained in our Brief, it was marked for identification and used for comparative purposes, as well as a source of information for the witnesses.[5/] The jury were clearly advised by witness Miller that the original card contained "some things that were not pertinent to the checks" (Trial Tr. p. 43), that the card was obtained from Detective Sergeant Kapsol (Trial Tr. p. 36), previously identified as the check squad police officer who had Appellant in custody in the check office in Metropolitan Police Headquarters, and as the person to whom the Appellant gave this document made out in his own handwriting

5/ The card, for example, included information that Appellant was educated in Europe. This fact was used by witness Miller as an important factor in his analysis (Trial Tr. 41). He also stressed the fact that Appellant had written the name "Ben Hilliard Jr." on the sample card -- the same name appearing on the alleged forged checks (Trial Tr. 39-40).

(Trial Tr. pp. 29-31). Witness Miller, offered as an expert in handwriting analysis, actually made his comparison of handwriting on the basis of this card, although a photographic reproduction of portions of that card was all that was offered in evidence (Govt. Ex. 6).

It is frivolous to contend that Government Exhibit 6 - the photographic reproduction of portions of the so-called "handwriting sample" card -- was not prejudicial. It was almost a counterpart of the checks which Appellant was accused of forging in text and every other aspect. Furthermore, the jury were clearly advised that it was only a part of a complete document executed by Appellant while in police detention. The Government cannot seriously maintain that it was used merely as a "handwriting sample". The Government had numerous other "samples", including the many handwritten court documents Appellant filed in his own hand before the third trial. The Government obviously wanted to get the utmost advantage of a document, written in Appellant's own hand, suggesting that Appellant had offered highly incriminating evidence against himself to the police. It has, however, long been established that while a comparison of a disputed writing with a genuine writing is admissible in evidence, such writings "may not be admissible for any other purpose in the cause". Hickory v. United States, 151 U.S. 303, 306-7. Photographic portions of this highly incriminating questionnaire were not used merely for handwriting comparison, but for the highly incriminating purpose of showing to the jury that Appellant had by his own hand executed a document equivalent to the checks he was charged with forging, and had given a police office other undisclosed information "not pertinent to the checks". The Government elected not to use the "best evidence" of Appellant's

incriminating admissions for obvious reasons. Its use of the photographic reproduction of the so-called "sample" check -- a closely analogous counterpart of those Appellant was accused of forging -- was no less prejudicial under the circumstances apparent to the jury. The use of photographic evidence constituting "representations of tableaux vivants" to impress on the jury the Government's version of what occurred, is prejudical per se. Fore v. State, 75 Miss. 727, 23 So. 710.

III.

The Indictment Should Have Been Dismissed for Failure of the Government to Prove That the Forgeries Charged in Counts 1, 3, and 5 of the Indictment Were Committed in the District of Columbia.

In response to Appellant's contention that the Government failed to prove the locus delicti of the crime of forgery as charged in three counts of the indictment (and that the companion "uttering" counts must fall since their proof depended upon proof that the checks were forged as alleged in the forgery counts), the Government discusses the totally unrelated issue of venue of federal crimes.

The locus delicti of the crime of forgery, as defined by 22 D. C. Code 1401, is not only an ingredient of the crime of forgery, as explained in our Brief, but it is a jurisdictional fact necessary to establish both the territorial and substantive ("subject matter") jurisdiction of the District Court. The rule in respect to territorial jurisdiction (Levitt, Jurisdiction over Crimes, 1926, 16 J. Crim. L. 316, 319-24) requires that "Every offender must be prosecuted for his offense in the place where the offense was committed; and he cannot be prosecuted in any place where the offense was not committed". In order to "find the locus you must find where the gist of the offense occurred" and "The courts within the

territorial unit where the offense occurred are the only courts that can take jurisdiction over the offense". In the samethesis, Levitt explains the distinction between "jurisdiction over offenses and the common law notion of venue" as follows: "Venue deals with the place from which the jury is to be summoned. Jurisdiction deals with the place where the trial is to occur". The cases cited by the Government deal with the issue of venue of federal crimes which are made illegal wherever committed in the United States. In respect to such crimes, any United States District Court has territorial and "subject matter" jurisdiction in respect to the crime subject only to the right of the defendant to assert or waive his privilege to be tried before a jury selected from the district where the crime was committed. Territorial and "subject matter" jurisdiction, however, is an absolute qualification on the power of a court to try the case. In respect to crimes defined in the District of Columbia Code, the District Court's substantive jurisdiction is dependent on proof that the crime was committed in the District of Columbia, and failure of such proof defeats its jurisdiction. For that reason, such fact must be alleged in the various counts of indictment (as was here the case) (4 Wharton, Criminal Law and Procedure (Anderson, 1957), Secs. 1777-8), and must be proved as an essential element of the crime charged under proper instructions to the jury, as shown in our Brief.

It has long been held that proof of the locus of a crime defined in the District of Columbia Code may not rest on inference, but the jury must be instructed that they must find that such crime was committed in this District on the basis of proof beyond a reasonable doubt. Davis v. United States, 18 App. D. C. 468, 495-496 (1901); and see cases cited in Brief, pp. 27-28. It has also been held that where the Government

fails to prove that a crime proscribed by the D. C. Code (e.g., larceny) was committed in the District of Columbia, it has failed to establish an essential element of the crime necessary to support a conviction. Brown v. United States, 35 App. D. C. 548.

In this case there was no evidence whatever tending to show that the alleged crimes of forgery were committed in the District of Columbia, and all evidence relating to this point showed that Appellant lived, worked, and was arrested in the State of Virginia, and under the Government's version of the evidence, brought 3 fully executed checks into the District of Columbia. If, as the Government contends, proof of the locus delicti can be shown by circumstantial evidence, the only permissible conclusion is that the fully executed checks which Appellant is charged with uttering, were (if any crime was committed as alleged) forged in the State of Virginia. Compare: George v. United States, 75 App. D.C. 197, 125 F.2d 559, 564. The further contention that the locus delicti of the crime of forgery may rest on a presumption or inference is totally inconsistent with the standard of proof of the elements of crime (proof beyond a reasonable doubt). Furthermore in these circumstances, no inference of fact may be drawn from a premise which is wholly uncertain. Kenny v. Washington Properties, 76 App. D.C. 43, 128 F.2d 612, 615. A rule allowing an accused to be found guilty of a crime on the basis of a presumption as to an essential element of that crime, unless he comes forward with evidence to overcome the non-existence of the presumed fact, is unconstitutional. Barrett v. United States, 322 F.2d 292 (C.A. 5, 1963); and see: Tot v. United States, 319 U.S. 463.

Whether or not the jury can presume or infer that the checks were forged in the District of Columbia from the fact that such checks were

found here, is, in any event an academic consideration in this case. The basic infirmity in this situation is that the trial judge gave no instruction on this subject at all, and therefore the jury could have disregarded the locus (i.e., the jurisdictional fact) entirely and reached their verdict regardless of where they believed the crime was committed. While the Government suggests that defense counsel should have taken exception to this critical defect in the trial court's instructions, it is clear that such defect is, within the meaning of Rule 52(b), F.R. Crim. P., plain error in the charge which affected substantial rights and must be noticed on appeal. United States v. Harmon, 323 F.2d 650 (C.A. 4, 1963). Furthermore, the issue of "lack of jurisdiction ... shall be noticed by the court at any time during the pendency of the proceeding", Rule 12(b)(2), F.R. Crim. P.

Our contention is, first, that there was a failure of the Government to prove and of the Court to charge, the essential jurisdictional fact necessary to prove the crimes of forgery as charged in Counts 1, 3 and 5. Secondly, as explained in our Brief, the elimination of Counts 1, 3 and 5 and the evidence adduced thereunder, results in a failure of proof of the companion crimes of "uttering", since, as the trial court instructed the jury, each "uttering" count was dependent upon proof that the same check was forged as alleged in its companion forgery count, forgery being a constituent element of the crime of uttering. Had the jury, for example, rendered a verdict of not guilty on any forgery count, there would be no question but that the companion count of uttering the same check would have fallen. By a parity of reasoning, if any forgery count is found on appeal not to have been established, the companion uttering count would also fall for lack of proof.

The Government relies on the "boiler plate" principle of Hirabayaski v. United States, 320 U.S. 81, that where equal concurrent sentences are imposed under several counts of an indictment, the reviewing court will not consider defects in any one count, if the sentence can be independently supported by a separate count, the validity of which has not been challenged. This principle is completely justified within the context of the assumptions on which the rule is based and is an extension of the principle that courts will not consider academic problems which do not affect the judgment and sentence. That is not this case. Here, in respect to each uttering count, it was necessary for the jury to find that the same check was forged as alleged in the companion forgery count as a necessary ingredient of the crime of uttering. The interlocking nature of the acts of forging and uttering the same instrument by the same person in the course of the same transaction is illustrated by the case of Frisby v. United States, 38 App. D. C. 22, where it was held that under such circumstances, only one crime was committed. While later it was apparently decided that the two offenses did not necessarily merge (Read v. United States, 55 App. D. C. 43, 299 Fed. 918), and that a new crime was committed every time a forged instrument was reuttered in the course of a continuing transaction, the fact remains that the crime of uttering must still be supported by proof that the same instrument was forged. Where that necessary proof is eliminated by invalidation of the evidence adduced under a related forgery count, the crime of uttering has not been proved, since uttering an unforged instrument does not come within the proscription of the statute. The Government might have elected to charge only the crimes of uttering and elicited independent proof that the same instruments were previously forged without regard to the locus in quo. But since it elected to separate each transaction

into two parts and sought to attach a separate penalty to each part, it cannot validly support the uttering counts in the face of a failure of proof that the same instruments were forged as independently charged in the invalid forgery counts. The evidence under the uttering counts begins with the Appellant allegedly presenting fully executed instruments for payment. Absent proof of the antecedent evidence that at some prior time Appellant forged the same instrument as charged in the companion count, the crime of uttering has not been proved.

IV.

Appellant Was Twice Put in Jeopardy When after a Second Trial Resulted in a Mistrial, He Was Convicted on a Third Trial.

The Government takes issue with the facts as set forth in Appellant's Brief in respect to whether the prosecutor had mentioned the counts of the indictment by number, and certain factual allegations contained in the two counts which the Government moved to dismiss (Counts 3 and 4). As noted in our Brief, the reporter's transcript is not complete, and obviously is not a full report of the preliminary proceedings and the Government's opening statement, as can be seen from the opening lines on its first page (see II Supp. Tr. p. 1). 6/ In any event, what is controlling is the understanding of the trial judge and counsel on the subject which is the legal foundation of the action taken. Cf., Fong Foo v.

6/ For example, the prosecutor stated, "As you were told a moment ago, the indictment in this case charges this defendant in some several counts with the crimes of forgery and uttering...etc." (II Supp. Tr. p. 1).

United States, 369 U.S. 141, 143. The trial judge recalled from his own notes [7/] that the prosecutor had in fact described all eight original counts to the jury, including the two counts that the Government was moving to dismiss (II Supp. Tr. p. 14). Both defense counsel and the Government attorney also agreed on the record that the Government attorney had also mentioned to the jury the restaurant involved in the transactions alleged in the two counts (Counts 3 and 4) which the Government was moving to dismiss, although the trial judge said that was not reflected in his own notes (Ibid, p. 15). On the basis of this incomplete record, it is hardly open to the Appellate Section of the U. S. Attorney's Office to dispute the record understanding of the court and counsel on the subject.

In respect to the Constitutional issue involved, we have fully explained our position in our Brief and will not here reargue the issue. In our Brief we have cited the recent and controlling decisions of the Supreme Court (Downum and Gori) which have illuminated the controlling principles applicable to this case. The cases cited by the Government which represented an earlier and more restrictive interpretation of the double jeopardy provision, are not only undermined by recent Supreme Court decisions, but are inapplicable on their facts. Long ago, the Supreme Court held, in effect, that each situation involving the Constitutional right securing an accused against twice being placed in jeopardy is sui generis, and cannot be resolved except on a case-by-case basis. United States v. Perez, 9 Wheat. 579, 588 (1824).

7/ Had the proceedings been completely transcribed by the reporter, the judge would, of course, have had the statements read back by the reporter.

The Government here argues for the broad principle, however, that "a defendant cannot plead former jeopardy when the jury before which he was first on trial was discharged on his own motion or with his consent". This argument as applied to the case at bar would mean that in circumstances where the action of the prosecutor and through no fault of the defendant makes the continuation of a fair trial impossible, the defendant is faced with the alternative of passively allowing the trial to proceed in violation of his rights to due process of law, or, alternatively, asking for trial before another jury which might well redound to the advantage of the Government in securing a conviction. Acceptance of the Government's position would actually encourage a Government prosecutor to commit prejudicial error, knowing that it would force defendant into a position where he must elect either to go ahead with an unfair trial or ask for a new trial on which the Government's chances of securing a conviction might be greatly enhanced. The result would be an abrogation of a defendant's constitutional right, after being placed in jeopardy, to have his trial continue to the rendition of a verdict by the jury. It exalts the technicality of who makes the motion terminating an unfair trial, over the more critical fact as to whose action effectively made the continuation of the first trial under circumstances of fairness, an impossibility. In Gori, as noted in our Brief, the crucial consideration in respect to the application of the double jeopardy rule is whether the discontinuance of the trial before verdict was the result of the actions of the prosecutor -- which it clearly was in this instance. Had the trial judge found that the action of the prosecutor rendered the continuation of the trial unfair to the Appellant (and as noted, the trial judge erroneously observed that it did not) and

had the trial judge declared a mistrial sua sponte, there would be no question that Appellant could not be retried. To hold that the court's erroneous failure to act sua sponte, followed by Appellant's motion that he do so, constitutes Appellant's consent to be retried, makes a mockery of the constitutional guarantee. Appellant did not consent to retrial -- his motion was in essence, a plea in bar, however captioned.

In Fong Foo v. United States, 369 U. S. 141, the Supreme Court dealt with a situation where a trial was terminated by the court on the basis of prejudicial misconduct of the prosecutor and over the objection of the prosecutor. There, however, the court entered a judgment of acquittal. The Government sought to have this judgment set aside on the basis of error in the court's finding that the prosecutor had, in fact, engaged in prejudicial misconduct, and argued that the court did not have the power to enter a judgment of acquittal (vis-a-vis a mistrial). The majority of the Court did not reach this issue, holding that the acquittal in any event was final and constituted a bar to further jeopardy. Implicit in the majority, concurring, and dissenting opinion is the proposition that a correct remedy would have been for the court to declare a mistrial, which under Gori would have precluded a retrial.

The Government's present position that whenever a jury is discharged due to some affirmative suggestion of the accused a consent to retrial is to be implied, is presently being urged by the Government in United States v. Tateo, on the Government's direct appeal to the Supreme Court (No. 328, Oct. Term, 1963). There, during a trial, a defendant changed his plea under 4 counts from not guilty to guilty, and the jury was discharged before verdict. The defendant in collateral proceedings later successfully attacked his conviction under these counts on the basis that the

plea was coerced. The Government is contending that the District Court's conclusion in United States v. Tateo, 216 F. Supp. 850 (S. D. N. Y. 1963), that the defendant cannot constitutionally be retried is in error, under a similar argument to that urged in the instant case; i. e., that the defendant had "waived" his right against twice being put in jeopardy, or had implicitly consented to be retried. Significant to the dissimilar circumstances of this case is the fact that the Jurisdictional Statement of the Solicitor General filed in the Supreme Court (p. 17, fn. 4) relies on the fact that the trial was terminated before jury verdict "without regard for the fact that the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution", citing Fong Foo and Gori.

We submit that when a defendant successfully procures a discontinuation of a trial before verdict solely because of prejudicial conduct of the prosecutor (without indicating any consent to be retried either being expressed or implied), he is not deemed to have "waived" his right not to be again tried on the same indictment. Green v. United States, 355 U. S. 184.

The Government makes the further contention that Appellant "waived" this constitutional right by not urging it at the outset of the third trial before the same judge who had declared a mistrial in the former proceeding. There are undoubtedly circumstances where the plea would have to be made where the court otherwise would not be advised of the facts upon which the issue is predicated. Here, however, the same judge (Judge Keech), who had declared the mistrial on February 8, 1963, was the trial judge at the trial on February 11, 1963. The February 11th transcript

does not reflect the preliminary proceedings. If, in fact, Appellant's court-appointed attorney failed to point out in some way the situation already known to the trial judge, this technical omission certainly cannot be rationally urged as a basis of "waiver" by Appellant of a valuable constitutional right. The court's error in retrying Appellant in light of the facts fully known to it constitutes plain error affecting substantial rights (Rule 52(b), F.R. Crim. P.) which this Court may notice.[8/]

V.

The Execution of the Judgment Would Under the Circumstances of This Case Constitute a Cruel and Unusual Punishment and Deny Appellant Equal Protection of the Laws.

As noted in Appellant's pending motion before this Court, Appellant has been incarcerated since September 2, 1960, for alleged crimes involving the total sum of $145.00, and should he fail to prevail on this appeal, he faces additional incarceration for up to five years under his unserved sentence.

It is our position that while the original sentence might not per se have been disproportionate to the crimes charged, when considered together with the inordinate length of time (now 3-1/4 years) which Appellant has been continuously incarcerated for the sole reason that he could not raise the bail necessary to procure his liberty, together with

8/ This Court can also take judicial notice of the fact that counsel appointed to represent indigent defendants are for the most part selected from those members of the bar specializing in civil practice rather than criminal law specialists. In passing on a purely technical objection of the sort here urged, the Court should take cognizance of this fact -- if the present system of providing counsel for indigents is to be considered to provide fair and equal representation of an accused in a contest with Government legal specialists.

other facts described in our motion, the execution of the sentence would in consideration of the nature of the crimes alleged, be constitutionally impermissible. As we pointed out in oral argument to this Court, execution of the sentence would in all probability render Appellant's total incarceration twice as long as that meted out to another defendant similarly situated, but able to furnish bail. This result is directly attributable to (1) Appellant's status as a pauper who though bailable, was unable to furnish the bond, and (2) the Government's acts resulting in three trials because of its own errors. The fact that Appellant would, if the sentence is imposed, suffer a double punishment is due to Appellant's non-criminal "status" as a pauper, and for that reason a double punishment would, in respect to the crimes charged, constitute a cruel and unusual punishment based on such "status". Cf., Robinson v. California, 370 U.S. 660; U. S. v. Pate, 32 L.W. 2225-6 (N.D. Ill., Nov. 7, 1963). It would also deny him equal protection of the law, depriving him of his liberty for twice the period to which a defendant able to raise bail would be subject. Had this distinction been based on race or religion, the discrimination would be entirely obvious. Discrimination based on poverty is no more justifiable. Cf., Gideon v. Wainwright, 83 S. Ct. 792.

Should this position not be accepted, however, it is apparent that remand for a full hearing might be requisite since there are other facts relating to the constitutionality of Appellant's sentence which are not properly of record. As pointed out in argument to this Court, the Government illegally restrained Appellant in the D. C. Jail from October 11, 1963 until November 27, 1963, in defiance of the order of this Court of October 10, 1963, that he be released. Its only justification

for this detention was on the basis of a so-called "fugitive warrant" issued by the Clerk of the D. C. Court of General Sessions on February 13, 1963, on the basis of a hearsay statement of a D. C. police officer before a deputy clerk of that Court, that on October 12, 1960, a court clerk in Montgomery County, Maryland, had issued a bench warrant for Appellant's arrest. Since this so-called "fugitive warrant" was, in any view of the matter, valid for only 30 days (23 D. C. Code 403-404), its execution on October 15, 1963, four days after Appellant was to be released, was illegal, as was Appellant's further incarceration until November 27, 1963, without extradition hearing or prior demand for extradition by the State of Maryland under 23 D. C. Code 401. See: Bruzard v. Matthews, 207 F.2d 25, 93 App. D. C. 47 (1953); 23 D. C. Code 408. 9/

Another related factor which is properly the subject of further consideration is that correspondence between Appellant and present counsel was recently censored by D. C. Jail authorities although plainly marked as attorney-client mail. We are now informed that this practice antedated Appellant's last trial. While not of record (except to the extent that this practice was described to this Court on argument of the motion), in the event of a remand this issue would be the proper subject of further hearing in connection with the relief sought in Appellant's pending motion to this Court.

9/ While instant counsel was properly served with every brief and pleading by the Government in connection with this appeal, he was neither served with the documents in the proceedings before the D. C. Court of General Sessions nor notified of those proceedings.

CONCLUSION

Wherefore, the premises considered, it is respectfully prayed that the conviction appealed from be reversed by this Court.

Respectfully submitted,

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